93-700

No.

Supreme Court, U.S.
FILED
NOV - 3 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BARBARA ANN CRANCER,
Petitioner,

vs.

U.S. DEPARTMENT OF JUSTICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID V. CAPES
(Counsel of Record)
RICHARD E. GREENBERG
ROSENBLUM, GOLDENHERSH,
SILVERSTEIN & ZAFFT, P.C.
7733 Forsyth Boulevard
Fourth Floor
Clayton, Missouri 63105
(314) 726-6868

Attorneys for Petitioner

BARBARA ANN CRANCER
7 Edgewood Road
St. Louis, Missouri 63124

Petitioner, Pro Se

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

18 pp

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misread this Court's rulings in holding that a District Court is without authority as a matter of law to require the preparation of a *Vaughn* index to support the withholding of documents pursuant to Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A).

TABLE OF CONTENTS

	Page
Question Presented For Review	i
Table Of Contents	iii
Table Of Appendices	iv
Table of Authorities	vi
Opinions Below	1
Jurisdiction	2
Constitutional And Statutory Provisions Involved	2
Statement Of The Case	2
Reason For Granting The Writ	6
THE *EN BANC* RULING CONTRAVENES THIS COURT'S HOLDINGS AND IMPROPERLY CREATES A BLANKET EXEMPTION FOR INVESTIGATIVE RECORDS	6
Conclusion	12

TABLE OF APPENDICES

		Page(s)
APPENDIX A[1]	Opinion of the United States Court of Appeals for the Eighth Circuit, *en banc*, in *In Re Department of Justice*, 999 F.2d 1302 (8th Cir. 1993)	A-1
APPENDIX B	Opinion of the United States Court of Appeals for the Eighth Circuit in *In Re Department of Justice*, 950 F.2d 530 (8th Cir. 1991)	A-34
APPENDIX C	Order of the United States District Court for the Eastern District of Missouri dated July 27, 1990	A-50
APPENDIX D	Order of the United States District Court for the Eastern District of Missouri dated August 16, 1990	A-52
APPENDIX E	Memorandum and Order of the United States District Court for the Eastern District of Missouri dated January 18, 1991	A-54
APPENDIX F	Order of the United States District Court for the Eastern District of Missouri dated March 22, 1991	A-57
APPENDIX G	Order of the United States District Court for the Eastern District of Missouri dated April 11, 1991	A-58

---

[1] Citations to Appendix are in the form "App. ___" or "Apps. ___-___" for more than one Appendix.

APPENDIX H	Order of the United States District Court for the Eastern District of Missouri dated April 18, 1991	A-60
APPENDIX I	Categorical Index of Documents Contained in Federal Bureau of Investigation Headquarters File 9-60052 (James R. Hoffa Disappearance File) of the U.S. Department of Justice	A-61
APPENDIX J	Publicly Released FBI Witness Statements on Disappearance of James Hoffa	A-66

TABLE OF AUTHORITIES

	Page(s)
Bevis v. Department of Justice, 801 F.2d 1386 (D.C. Cir. 1986)	10,11
Brian Dickerson v. Department of Justice, 992 F.2d 1246 (6th Cir. 1993), *petition for cert. filed*	7
Department of Justice v. Landano, ___ U.S. ___, 113 S.Ct. 2014 (May 24, 1993)	6
Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772 (1989)	6
Department of Justice v. Tax Analysts, 492 U.S. 136 (1989)	6
Department of the Air Force v. Rose, 425 U.S. 352 (1976)	6
FBI v. Abramson, 456 U.S. 615 (1982)	10
In re Department of Justice, 999 F.2d 1302 (8th Cir. 1993)	iv,1,5
In re Department of Justice, 950 F.2d 530 (8th Cir. 1991)	iv,1,5
John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989)	6,7
King v. Department of Justice, 830 F.2d 210 (D.C. Cir. 1987)	9
Mapother v. Department of Justice, ___ F.3d ___ (D.C. Cir. 1993)(available at 1993 W.L. 356083)	8
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)	9,10

Powell v. United States Bureau of Prisons, 927 F.2d 1239 (D.C. Cir. 1991) 8

Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir. 1992) 8

Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) 4

Vaughn v. United States, 936 F.2d 862 (6th Cir. 1991) 1,4,10

Weiner v. FBI, 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 3013 (1992) 9

5 U.S.C. § 552(b)(7)(A) ..... *passim*

28 U.S.C. § 1254(1) 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BARBARA ANN CRANCER,
Petitioner,

VS.

U.S. DEPARTMENT OF JUSTICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, the Honorable Barbara Ann Crancer, Associate Circuit Judge for the Twenty-First Judicial Circuit of the State of Missouri ("Petitioner"), respectfully prays that a writ of certiorari issue to review the *en banc* opinion and judgment of the United States Court of Appeals for the Eighth Circuit which was entered on August 5, 1993.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit is reported as *In re Department of Justice*, 999 F.2d 1302 (8th Cir. 1993). App. A. The panel decision of the Eighth Circuit is reported as *In re Department of Justice*, 950 F.2d 530 (8th Cir. 1991). App. B. The District Court Orders requiring the preparation of an index pursuant to *Vaughn v.*

Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), dated July 27, 1990, August 16, 1990, January 18, 1991, March 22, 1991, April 11, 1991, and April 18, 1991, are unreported. Apps. C-H.

JURISDICTION

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit was entered on August 5, 1993, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 552(b)(7)(A) provides in pertinent part as follows:

> (b) This section does not apply to matters that are —
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, ...

The last sentence of 5 U.S.C. § 552(b) provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT OF THE CASE

For more than five years, Petitioner, daughter of James ("Jimmy") R. Hoffa, has attempted to obtain information pursuant to the Freedom of Information Act ("FOIA") regarding the disappearance of her father 16 years ago. The Federal Bureau of Investigation ("FBI") has admitted that it has at least 69 volumes of records and almost 14,000 pages of documents. Only 290 pages of public source documents have been produced, and the

vast remainder have been withheld under the FOIA, pursuant to Exemption 7(A), 5 U.S.C. § 552(b)(7)(A).

To support its claim of exemption, the FBI provided the District Court with "categorical" descriptions of the withheld documents that changed with each of the three, cursory showings proffered to the District Court.[2] The last categorization pur-

[2] Notwithstanding the filing of sworn statements, the FBI categories have expanded and contracted without explanation with each filing. In first moving for summary judgment, the Government filed the Declaration of Angus B. Llewellyn who identified the responsive documents in the file as follows:

> The file contains the results of extensive investigation into Hoffa's disappearance, including documents which contain the results of interviews with numerous individuals, information provided by confidential sources, reports on the location and viability of potential evidence, background information on suspects, and materials which detail the procedures followed by the FBI in conducting the investigation.

Declaration of Angus B. Llewellyn at ¶ 6.

In the Second Declaration of Angus B. Llewellyn, Mr. Llewellyn states that the documents in the file are "categorized" as follows:

1. Documents setting forth leads to be conducted;

2. Documents containing information received from confidential informants;

3. Information and documents provided by local law enforcement;

4. Interviews of third parties and cooperating witnesses;

5. Public source information such as newspaper clippings and press releases;

6. Laboratory reports setting forth results of examination; and

7. Polygraph worksheets and reports.

Second Llewellyn Declaration at ¶ 12.

Finally, the Government submitted its "index" of withheld documents. App. I. On its face, it reveals categories of documents that are not exempt from disclosure or that were previously unidentified. These include the following:

(Footnote 2 continued on next page)

ported to describe the 14,000 pages of documents in just five pages. App. I. Conspicuously absent from the "showings" were representations that: (1) all documents had been properly described by the proffered five-page index; (2) any official had reviewed or inspected the withheld documents in creating the index; (3) none of the withheld documents had been publicly released;[3] and (4) all information that was segregable and not subject to the exemption was released.

Dissatisfied with the cursory and conclusionary showing of the FBI for its claim of blanket exemption, the District Court properly ordered, on four separate occasions, that the U. S. Department of Justice ("DOJ") file an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)("a *Vaughn* index"), to describe the withheld documents. Apps. C-H.

(Footnote 2 continued)

Category D: FBI field office reports on financial expenditures and manpower allocations. The basis for withholding these documents, the majority of which are up to seventeen-years-old, is unintelligible, and the documents were not previously disclosed in the FBI Declarations.

Category E: High level conferences and status reports on the investigation. Although such reports may have been sensitive at the time made, reports that are now seventeen-years-old regarding strategy decisions should be releasable with redactions for confidential source materials; and

Category I: Memoranda updating the Director on FBI investigative efforts. Again, many of these documents may be as old as seventeen years. Although the documents may contain confidential source information of secret investigative techniques, such information can certainly be redacted allowing release of the information that is not subject to a FOIA exemption.

[3] Of particular importance, Petitioner demonstrated that the FBI had publicly released certain witness interviews and other documents which the FBI has withheld from the Petitioner. Witness interviews that have been released by the FBI but not provided to Petitioner are attached as App. J.

The DOJ then filed a Petition for Writ of Mandamus and a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit on May 14, 1991, and May 22, 1991, respectively. Following the issuance of a stay of the District Court's Orders pending appellate review, and consolidation of the appeals, a panel of the Eighth Circuit affirmed the District Court's Orders. The panel recognized that the FBI had failed to provide adequate information regarding the nature of the withheld documents:

> The district court's dissatisfaction is understandable given the government's blanket assertion that all 13,800 documents, accumulated over a 15-year span, fit neatly into nine categories described over the course of five pages. Furthermore, Crancer raised arguments that, in the district court's belief, raised serious questions about the validity of the government's search and categorization.

In re Department of Justice, 950 F.2d at 535; App. B. The "serious questions" stem from the repeated failure of the DOJ to state that all documents were, in fact, included in the proffered categorization and that any official even examined the file and reviewed the documents in creating the five-page categorization.

The panel decision was then reversed by the court sitting *en banc*. *In re Department of Justice*, 999 F.2d at 1302; App. A. The court held that the Order for a *Vaughn* index "exceeds the bounds of the statute as interpreted by the Supreme Court and tnis court." *Id.* at 1309. Accordingly, the Court of Appeals *en banc* reversed the District Court Orders and held that a District Court exceeded its authority by requiring the filing of the traditional *Vaughn* index by the DOJ to justify the withholding of documents under Exemption 7(A).

REASON FOR GRANTING THE WRIT

THE *EN BANC* RULING CONTRAVENES THIS COURT'S HOLDINGS AND IMPROPERLY CREATES A BLANKET EXEMPTION FOR INVESTIGATIVE RECORDS.

The Freedom of Information Act, 5 U.S.C. § 552, enables citizens regardless of status to gain access to Government documents, thus "'open[ing] agency action to the light of public scrutiny'." *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 772 (1989), *quoting Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *see also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989)("[FOIA] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands"). The FOIA's purpose "is 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed'." *John Doe Agency*, 493 U.S. at 152, *quoting NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It requires "full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 360 (1976). The exemptions "must be narrowly construed." *Id.* at 361; *see also Department of Justice v. Landano*, ___ U.S. ___, 113 S.Ct. 2014, 2024 (May 24, 1993)("[O]ur obligation [is] to construe FOIA exemptions narrowly in favor of disclosure. . . .").

This Court has repeatedly enforced the mandate of 5 U.S.C. § 552(a)(4)(B) that it is the burden of the Government to show that documents are properly withheld. *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 755 (1989); *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151

(1989). For Exemption 7(A), only records or information compiled for law enforcement purposes are exempt, and "the Government has the burden of proving the existence of such a compilation for such a purpose." *John Doe Agency v. John Doe Corp.*, 493 U.S. 153 (1989).[4]

In 1974, Congress amended Exemption 7(A) to, among other reasons, preclude the ability of "agencies . . . to commingle otherwise non-exempt materials with exempt materials in a law enforcement investigative file and claim protection from disclosure for the contents." *John Doe Agency*, 493 U.S. at 156; Pub L. 89-487, Section 3(e)(7), 80 Stat. 251. To prevent "evasive commingling," Exemption 7(A) requires "consideration of each particular document as to which exemption was claimed." *John Doe Agency*, 493 U.S. at 157, *citing Robbins Tire*, 437 U.S. at 221-22.

The Court of Appeals' *en banc* ruling eviscerates this requirement. Here, the District Court found that the cursory and inconsistent showing of the Government utterly failed to be sufficient to meet the Government's burden of proof under Exemption 7(A). At no time did the DOJ show that (1) all withheld documents had been reviewed, (2) all withheld documents fit within the claimed categories, (3) all withheld documents had, in fact, never been publicly released, and (4) all

---

[4] Under Exemption 7(A), the Government must show not only that the records "were compiled for law enforcement purposes," but also that the disclosure of the records can "reasonably be expected to interfere with law enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Neither the District Court nor the Court of Appeals has addressed the latter issue. This issue has been reached in a separate action seeking release of the same documents, *Brian Dickerson v. Department of Justice*, 992 F.2d 1246 (6th Cir. 1993), for which a petition for certiorari has been filed and is pending. In *Dickerson*, the Sixth Circuit affirmed a finding of potential interference by reviewing, *in camera*, a self-serving sample of documents without the benefit of the adversary process.

withheld documents contained no segregable information.[5] For this reason, the District Court required a *Vaughn* index to ensure that there would be a specific document-by-document review to ensure that the Government met its burden under the FOIA:

> The significance of agency affidavits in a FOIA case cannot be underestimated. As, ordinarily, the agency alone possesses knowledge of the precise content of documents withheld, the FOIA requester and the court both must rely upon its representations for an understanding of the material sought to be protected.
>
> * * *
>
> Affidavits submitted by a governmental agency in justification for its exemption claims must therefore strive to correct, however, imperfectly, the asymmetrical distribution of knowledge that characterizes FOIA litigation. The detailed public index which in *Vaughn* we required of withholding agencies is intended to do just that: "to permit adequate adversary testing of the agency's claimed right to an exemption," and enable "the District Court to make a rationale decision whether the withheld material must be produced without actually viewing the documents them-

---

[5] Administrative agencies "shall" provide "[a]ny reasonably segregable portion of a record . . . after the deletion of the portions which are exempt." 5 U.S.C. § 552(b). The segregability requirement "applies to all documents and all exemptions in the FOIA." *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992). The failure to make a finding on segregability warrants reversal. *See Mapother v. Department of Justice*, ___ F.3d ___ (D.C. Cir. 1993)(available at 1993 W.L. 356083); *Powell v. United States Bureau of Prisons*, 927 F.2d 1239, 1242 n.4 (D.C. Cir. 1991).

The District Court requirement that each document be reviewed ensures that segregability is considered and satisfied; the *en banc* opinion ignores the segregability requirement and allows the DOJ to ignore it in satisfying its burden under Exemption 7(A).

> selves, as well as to produce a record that will render the District Court's decision capable of meaningful review on appeal." Thus, when an agency seeks to withhold information, it must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment if they are "conclusory, merely reciting statutory standards, or if they are too vague or sweeping." To accept an inadequately supported exemption claim "would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review.

King v. Department of Justice, 830 F.2d 210, 218-19 (D.C. Cir. 1987). "[T]he purpose of the index is not merely to inform the requester of the agency's conclusion that a particular document is exempt from disclosure under one or more of the statutory exemptions, but to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the content." *Weiner v. FBI*, 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 3013 (1992).

The holding of the Court of Appeals is unprecedented. This Court has never held that a District Court is without power to order a *Vaughn* index when faced with inadequate showings by the Government to justify withholding. Nothing in the plain language of the statute supports or implies that a *Vaughn* index cannot be required to ensure compliance by the Government with its duty under the FOIA.

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), does not support the *en banc* opinion. In *Robbins Tire*, this Court held that particularized showings of harm stemming from the

premature disclosure of witness statements were not required under the FOIA. 437 U.S. at 236. The decision addresses categorical showings for similar documents to demonstrate the likelihood of interference with enforcement proceedings; not whether a court must accept a five-page categorical index as an adequate description for 14,000 pages of documents. Nothing in the statutory language of the FOIA or the decisions interpreting that language provide that the District Court has been divested of authority to require a *Vaughn* index in an Exemption 7(A) case where the FBI has repeatedly failed to make the requisite showing that the withheld documents have been properly categorized.

To be sure, categorical showings under *Robbins Tire* are permissible to demonstrate the likelihood of harm. But such showings cannot be sufficient if the Government has not first shown that the responsive documents at issue fit within the identified categories. *See, e.g., Vaughn v. United States*, 936 F.2d 862, 868 (6th Cir. 1991). The requirement of a *Vaughn* index ensures the "individual scrutiny" by the Government that would otherwise result in "categories that would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA." *Bevis v. Department of Justice*, 801 F.2d 1386, 1389 (D.C. Cir. 1986), *quoting Robbins Tire*, 437 U.S. at 236.

If left undisturbed, the *en banc* opinion serves to guarantee the withholding of any documents claimed to be exempt under Exemption 7(A). The categorization set forth in the five-page index describes documents in such broad terms that the index could, and will, in all likelihood, be used for every investigative file maintained by the FBI. If this inadequate showing is left unchallenged, the FBI will have, *defacto*, a blanket exemption for all investigative files even though Congress specifically amended the FOIA in 1974 to ensure that this would not be the case. *See FBI v. Abramson*, 456 U.S. 615, 621-22 (1982).

This danger is real. The holding of the Court of Appeals bars a District Court from requiring the individual review of the documents in an investigative file that is required if Exemption 7(A) is not to become the blanket exemption Congress intended to preclude through the 1974 Amendment to the FOIA. Absent the use of a *Vaughn* index, there is simply no mechanism to ensure that the Government satisfies its burden in properly categorizing the documents, or even reviews the documents in the first instance before claiming a blanket exemption under Exemption7(A). The effect of the court's holding is to gut the requirement that, although the FBI "need not justify its withholding on a document-by-document basis in court, the FBI must itself review each document to determine the category in which it properly belongs." *Bevis v. Department of Justice*, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

Suspicion of Government has recently increased as files remain closed for decades and film-makers produce inflammatory films, such as "JFK." The FOIA was intended to increase trust in Government by providing for disclosure of documents to produce greater understanding of governmental conduct. The history of resistance shown here to a devoted and loving daughter's legitimate request for information regarding the disappearance of her father over eighteen years ago only increases skepticism as to what the FBI did or did not do in investigating the crime, or what the FBI knew or did not know as to how the crime was committed. Petitioner is not asking this Court to order the release of any documents today; only that the FBI and DOJ be required to conform to the dictates of the FOIA and the four District Court Orders to permit further litigation on an informed basis as to whether the withheld documents should be released.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision below.

Respectfully submitted,

David V. Capes
(Counsel of Record)
Richard E. Greenberg
ROSENBLUM, GOLDENHERSH,
SILVERSTEIN & ZAFFT, P.C.
7733 Forsyth Boulevard
Fourth Floor
Clayton, Missouri 63105
(314) 726-6868

Barbara Ann Crancer
7 Edgewood Road
St. Louis, Missouri 63124

Petitioner, Pro Se

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2080

In re: Department of Justice,
Petitioner.

No. 91-2164

Barbara Ann Crancer,
Appellee,

v.

United States Department of Justice,
Appellant.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: May 11, 1992

Filed: August 5, 1993

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, and HANSEN, Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

In *In re Department of Justice*, 950 F.2d 530 (8th Cir. 1991) (*Crancer I*), a panel of this court upheld the district court's order

requiring the government to provide a *Vaughn*[1] index after the government had invoked Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (1988). We granted the government's suggestion for rehearing *en banc* and vacated the panel's decision. We now issue a writ of mandamus, vacate the challenged order, and remand the case to the district court for further proceedings.

I.

In 1987, Barbara Ann Crancer filed a Freedom of Information Act (FOIA) request with the Department of Justice. Crancer sought the release of certain information uncovered during the investigation conducted by the Federal Bureau of Investigation into the disappearance of her father, Jimmy Hoffa, the former president of the International Brotherhood of Teamsters. The FBI's investigation has resulted in the accumulation of more than 13,800 pages of records relating to Hoffa's disappearance.

The Department denied Crancer's request on the basis of Exemption 7(A), contending that the Hoffa FBI file contains "records or information compiled for law enforcement purposes," the release of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

After exhausting her administrative remedies, Crancer brought suit to compel the Department to provide her with the documents she had requested. During the pendency of her suit, Crancer filed a second, broader request seeking any and all materials relating to the FBI's investigation into Hoffa's disappearance. After this request was administratively denied by the Department, also on the basis of Exemption 7(A), Crancer amended her complaint to include her second request.

---

[1] *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

The Department moved for summary judgment on the basis of the claimed exemption. The district court ordered the Department to provide Crancer with a *Vaughn* index so that she could effectively oppose the government's pending motion. The court's order required the Department to produce an "itemized, indexed inventory of every agency record or portion thereof responsive to plaintiff's FOIA request," together with a "detailed justification statement covering each refusal to release [an] agency record[] or portions thereof." D. Ct. Order of July 27, 1990, at 1. The Department asked the court to reconsider its order directing the production of the *Vaughn* index. This request was denied. The Department then requested that the district court modify its earlier order and allow the Department to provide a categorical description of the documents contained in the Hoffa FBI file. The Department submitted a list of nine categories of documents and an affidavit describing the potential interference with enforcement proceedings that would result if it were required to compile a *Vaughn* index. The district court denied this request and ordered the Department to submit the *Vaughn* index to a magistrate judge for *in camera* review.

In lieu of submitting a *Vaughn* index, the Department asked the magistrate judge to review the actual documents *in camera*. The magistrate judge denied this request, but extended the time period in which the *Vaughn* index was to be submitted. The Department then asked the district court to reconsider the magistrate judge's order or, in the alternative, to certify the matter for interlocutory appeal. These requests were also denied.

The Department then sought relief from this court, asserting jurisdiction under the collateral order doctrine, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), or the All Writs Act, 28 U.S.C. § 1651(b).

In *Crancer I*, the panel asserted jurisdiction under the All Writs Act and upheld the district court's order requiring the preparation of a *Vaughn* index. The panel first determined that

the Department could not be required to provide a specific factual showing and explanation describing why each document is exempt. It went on to hold, however, that the Department could be required to make a specific factual showing to demonstrate why each document belongs in a certain category, along with an explanation describing why the category itself is exempt from disclosure.

II.

We first examine whether, and the basis upon which, we have jurisdiction to hear this case.

We possess discretionary writ-issuing authority under the All Writs Act, 28 U.S.C. § 1651(b). As noted by the panel in *Crancer I*, mandamus is "available only in those exceptional circumstances amounting to a judicial usurpation of power." *In re Ford Motor Co.*, 751 F.2d 274, 275 (8th Cir. 1984).

The panel determined that:

> [The Department's] argument is a novel one and has not been directly addressed by any court. If [the Department] is correct in its contention that the district court lacked authority to order a *Vaughn* index, then a writ would be the proper remedy. Because the issue of whether the writ is available is intertwined with the merits of this interlocutory matter, we must decide whether the district court had authority to require a *Vaughn*-type index in these circumstances.

Crancer I, 950 F.2d at 532 (citation omitted). We agree with the panel's analysis and believe that this case presents a unique situation. Thus, we conclude that we have jurisdiction to decide the question whether the district court's order directing the Department to produce a *Vaughn* index in the face of the Department's invocation of Exemption 7(A) constituted a judicial usurpation of power.

III.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed" *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Consistent with this policy of broad disclosure, the government is required to release all requested information upon the demand of any member of the public. *Id.* at 221; *see also Curran v. Department of Justice*, 813 F.2d 473 (lst Cir. 1987); *Irons v. FBI*, 811 F.2d 681, 685 (lst Cir. 1987). Congress fashioned certain explicit exemptions from disclosure, however, in order to preserve vital government policies and, in some cases, to protect individuals. *See* 5 U.S.C. § 552(b)(1)-(9); *see also Robbins Tire*, 437 U.S. at 220-21 ("Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests.").

Once information is requested under FOIA, therefore, the government must provide the information unless it determines that a specific exemption applies. Likewise, the government bears the burden of demonstrating that the claimed exemption applies. 5 U.S.C. § 552(a)(4)(B). The district court must determine *de novo* whether the government has satisfied its burden. *Id.*

In the face of a claimed statutory exemption, district courts have sometimes required the government to provide a *Vaughn* index. "This indexing procedure is perceived as necessary to permit the district court and the requesting party to evaluate the [government's] decision to withhold records and to ensure its compliance with the mandates of the FOIA." *Barney v. IRS*, 618 F.2d 1268, 1272 (8th Cir. 1980) (per curiam).

A *Vaughn* index provides a specific factual description of each document sought by the FOIA requester. Specifically, such

an index includes a general description of each document's contents, including information about the document's creation, such as date, time, and place. *Crancer I*, 950 F.2d at 533. "For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided." *Id.*; *see also Barney*, 618 F.2d at 1272.

Exemption 7(A) of FOIA provides that the act "does not apply to matters that are— * * * (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings[.]" 5 U.S.C. § 552(b)(7)(A). The government contends that the courts have interpreted this exemption differently from other FOIA exemptions, with the result that a district court may not order the production of a *Vaughn* index when Exemption 7(A) is invoked.

In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court addressed the burden that the government must bear when asserting Exemption 7(A). In that case, the FOIA requester, an employer, sought from the National Labor Relations Board all statements made by potential witnesses prior to a Board hearing on the employer's unfair labor practices. *Id.* at 216. On appeal, the employer argued that the district court had erred by not requiring the government to make an individualized showing that each withheld document fit within the limits of Exemption 7(A). The Supreme Court rejected this argument, interpreting Exemption 7(A) of FOIA to require the government to prove that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *Id.* at 236.

In support of its ruling, the Supreme Court noted that:

> [t]here is a readily apparent difference between [Exemption 7(A)] and [Exemptions 7(B)-(D)]. The latter [exemptions] refer to particular cases . . . and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since [Exemption 7(A)] speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

437 U.S. at 223-24. The Court then examined Exemption 7's legislative history, which appeared to confirm the Court's observation regarding the distinguishing characteristic of Exemption 7(A). *Id.* at 224-34. The Court further noted that had Congress intended that "the Government in each case show a particularized risk to its individual 'enforcement proceedin[g],'" it could have done so. *Id.* at 234.

The Court also addressed Congress's 1974 amendment of Exemption 7(A). This amendment was designed "to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." *Id.* at 236. The Court's discussion of President Ford's veto of the 1974 amendment and the subsequent congressional override is instructive for our present analysis. The President was concerned that the 1974 amendment to Exemption 7(A) "would require the Government to 'prove . . .—separately for each paragraph of each document—that disclosure "would" cause' a specific harm" to enforcement proceedings. *Id.* at 235 (citation omitted). Congressional supporters of the amendment termed the President's interpretation of the amendment "'ludicrous,'" stating that the "'burden is substantially less than we would be led to believe by the President's message.'" *Id.* (citation omitted).[2]

---

[2] For further discussion of the legislative history of the 1974 amendment to Exemption 7(A), *see Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 626 (1982); *Campbell v. Department of Health and Human Serv.*, 682 F.2d 256, 261-63 (D.C. Cir. 1982).

The Court concluded that although the 1974 amendment to Exemption 7(A) was designed to eliminate blanket exemptions for records found in investigatory files, Congress did not intend that generic determinations of those materials entitled to Exemption 7(A) protection could never be made. Rather, the government must demonstrate, and courts must determine, whether "disclosure of particular kinds of investigatory records . . . would generally 'interfere with enforcement proceedings.'" *Id.* at 236. In other words, Congress intended that certain types or categories of investigatory records be withheld under Exemption 7(A) because disclosure of documents within those categories generally would interfere with enforcement proceedings.

With this understanding, post-*Robbins Tire* courts have made these determinations generically, category-of-document by category-of-document. In *Barney v. IRS*, for example, we were confronted with the question whether, in the wake of *Robbins Tire*, the government was required to provide a *Vaughn* index after the government invoked Exemption 7(A). 618 F.2d 1268 (8th Cir. 1980) (per curiam). We held that "[t]o sustain its burden of showing documents were properly withheld under exemption 7(A) the government had to establish only that they were investigatory records compiled for law enforcement purposes and that production would interfere with pending enforcement proceedings." *Id.* at 1272-73. The *Barney* court bolstered its conclusion by emphasizing that "[u]nder exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." *Id.* at 1273 (citing *Robbins Tire*, 437 U.S. at 234-35).

Congress amended Exemption 7 in 1986 to lessen the burden on the government in establishing the application of Exemption 7(A). Freedom of Information Reform Act of 1986 (FIRA), Pub. L. No. 99570, § 1802, 100 Stat. 3207, 3207-48 (1986). Whereas under the 1974 version of Exemption 7(A), the government bore

the burden of showing that the production of the requested law enforcement records "would interfere with enforcement proceedings," under the 1986 version the government need only show that the production of law enforcement records or information "could reasonably be expected to interfere with law enforcement proceedings."

In 1989, the Supreme Court revisited the government's burden under Exemption 7, this time focusing on the use of categorical determinations under Exemption 7(C), which covers documents whose production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) ("*Reporters Committee*"). In *Reporters Committee*, a group of journalists requested that the FBI disclose an individual's computerized criminal history file, known colloquially as the person's "rap sheet." The Supreme Court held that the production of rap sheets "as a categorical matter" could reasonably be expected to constitute an unwarranted invasion of a citizen's privacy. *Id.* at 780.

The Court discussed its earlier approval of a categorical approach to Exemption 7(A) in *Robbins Tire*. The Court noted that it had based its ruling in *Robbins Tire* on the perception that Exemption 7(A)'s reference to the plural "enforcement proceedings" supported a categorical approach when 7(A) was invoked, in contrast to the singular references in the other subsections of Exemption 7, which seemed to suggest a case-by-case balancing. Finding that "[j]ust as one can ask whether a particular rap sheet is a 'law enforcement record' that meets the requirements of [Exemption 7(C)], so too can one ask whether rap sheets in general . . . are 'law enforcement records' that meet the stated criteria," the Court concluded that its approval of a categorical approach for Exemption 7(A) applied with equal force to the other subsections in Exemption 7. *Id.* at 779. Because the Court found that the disclosure of computerized compilations of an

individual's criminal history could always be expected to constitute an invasion of an individual's privacy, it held that rap sheets as a category are exempted from disclosure under FOIA. *Id.* at 780.

The Court also supported its holding that a categorical approach was appropriate for Exemption 7(C) as well as 7(A) by pointing to the 1986 amendment. The Court stated that the amended 7(C), which like 7(A) had changed from the more stringent "would" to the more flexible "could reasonably be expected to," was enacted "to give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." *Id.* at 777 n.22. The Court further noted that the amendment was designed to "replace a focus on the effect of a particular disclosure 'with a standard of reasonableness . . . based on an objective test.'" *Id.* This reasonableness standard, the Court concluded, "amply supports a categorical approach to the balance of private and public interests in Exemption 7(C)." *Id.* The Court's conclusion concerning the effect of the amendment applies with equal force to Exemption 7(A), given the Court's conclusion that all of the Exemption 7 subsections should be interpreted similarly with respect to the use of categorical justifications.

Recently, the Court further explained its categorical approach in *United States Dep't of Justice v. Landano*, 113 S. Ct. 2014 (1993). Seeking to support a claim that the government had failed to disclose exculpatory evidence in his earlier criminal case, Landano sought all of the FBI files connected with the police officer's murder for which Landano had been convicted. After releasing a portion of its files, the FBI withheld certain documents on the grounds that they were exempt under Exemption 7(D), which applies to law enforcement records or information whose production "could reasonably be expected to disclose the identity of a confidential source." The district court largely rejected the government's categorical explanations and held that

the FBI had to articulate "case-specific reasons for non-disclosure" of all information other than records pertaining to regular FBI informants. *Id.* at 2018. The Court of Appeals for the Third Circuit affirmed, holding that the government had to provide detailed explanations relating to each alleged confidential source in order to justify nondisclosure under Exemption 7(D). *Id.* at 2019.

The Supreme Court reversed and remanded. The Court first rejected the government's argument that it is entitled to a presumption under FOIA that all FBI sources are confidential and that any records relating to FBI sources should be presumptively exempt from disclosure. The Court noted that the government's proposed presumption was not rebuttable, as argued by the government, but amounted to an irrebuttable presumption or blanket exemption that found no support in the language or legislative history of Exemption 7(D). *Id.* at 2023.

The Court, however, did not agree with the Third Circuit's requirement that the government must provide a detailed justification relating to each alleged confidential source. To the contrary, the Court stated that the government could point to categories of documents, the circumstances surrounding which would support the inference that the sources to whom they pertained were confidential. *Id.* at 2023. For example, the Court suggested that "paid informants normally expect their cooperation with the FBI to be kept confidential," implying that the government need only present a category of documents relating to paid informants, whose production could reasonably be expected to disclose the informant's identity, in order to justify nondisclosure under Exemption 7(D). *Id.* As a second example, the Court opined that eyewitnesses to a gang-related murder could also probably be presumed to be confidential. *Id.* The Court concluded that such a generic, categorical approach best articulated Congress's intent "to provide " 'workable' rules"' of FOIA disclosure." *Id.* (citing *Reporters Committee*, 489 U.S. at 779).

Thus, we conclude that the Supreme Court has consistently interpreted Exemption 7 of FOIA (specifically so far subsections 7(A), 7(C), and 7(D)) to permit the government to proceed on a categorical basis in order to justify nondisclosure under one of Exemption 7's subsections. *See Landano*, 113 S. Ct. at 2023-24; *Reporters Committee*, 489 U.S. at 779-80; *Robbins Tire*, 437 U.S. at 241-43. The Court's interpretation of Exemption 7 and Congress's intent in enacting it has been strengthened by the 1986 amendment, which provided for greater flexibility and lessened the government's burden. *See Reporters Committee*, 489 U.S. at 777 n.22.

Our interpretation of Exemption 7(A) in *Barney* mirrors the Supreme Court's interpretation. Moreover, consistent with the teachings of *Robbins Tire*, our analysis in *Barney* is in accord with the principle that "'the inherent nature of the requested documents is irrelevant to the question of exemption.'" *Curran*, 813 F.2d at 474 (quoting *Irons v. FBI*, 811 F.2d 681, 685 (1st Cir. 1987)). This interpretation is consistent with decisions from other circuits. *See. e.g., Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987); *Curran*, 813 F.2d at 475; *Church of Scientology of Calif. v. IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986); *Campbell*, 682 F.2d at 265.[3]

The District of Columbia Circuit, which originally developed the *Vaughn* index, has succinctly explained the relationship

---

[3] The panel attempted to distinguish these cases on the ground that the appellate courts were reviewing district court decisions that had found *Vaughn* indices not to be required. *Crancer I*, 950 F.2d at 534. We find this reasoning unpersuasive. Whatever the procedural posture, the Supreme Court has made clear that the government does not have to provide fact-specific information with respect to each document to justify its claim that Exemption 7(A) applies. As demonstrated, the actual contents of the documents are not relevant when the propriety of Exemption 7(A) is in dispute. *See Robbins Tire*, 437 U.S. at 236. Rather, the government may meet its burden by showing how disclosure of each category of documents would likely interfere with the investigation. *Id.*

between Exemption 7(A), as interpreted by *Robbins Tire*, and the use of *Vaughn* indices:

> [w]hen . . . a claimed FOIA exemption consists of a generic exclusion [such as Exemption 7(A)], dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile. Thus, in *NLRB v. Robbins Tire & Rubber Co.*, [citation omitted], the Supreme Court upheld, without any provision of a *Vaughn* index, the Labor Board's refusal to provide under FOIA witness statements obtained in the investigation of pending unfair labor practice proceedings. A *Vaughn* index would have served no purpose since . . . [Exemption 7(A)] did not require a showing that each individual document would produce such interference, but could rather be applied generically, to classes of records such as witness statements.

Church of Scientology, 792 F.2d at 152 (Scalia, J.).

In light of the above discussion, the district court's order for a *Vaughn* index in the present case appends an additional requirement to Exemption 7(A) that exceeds the bounds of the statute as interpreted by the Supreme Court and this court. The district court's order required the government, after identifying each document, to provide a "detailed justification statement covering each refusal to release said agency records or portions thereof." D. Ct. Order of July 27, 1990, at 1. This goes beyond the categorical explanations that the Supreme Court in *Robbins Tire* held to be sufficient to justify nondisclosure under Exemption 7(A).

In sum, the government bears the burden of establishing that Exemption 7(A) applies. And under *Robbins Tire*, Exemption 7(A) does not require that the government produce a fact-specific, document-specific, *Vaughn* index in order to satisfy that burden. The contents of the requested documents are irrel-

evant. It is the particular categories of documents, and the likelihood that the release of documents within those categories could reasonably be expected to threaten enforcement proceedings, on which the court must focus. The district court, therefore, acted beyond the scope of its authority when it ordered the Department to produce a *Vaughn* index

IV.

"Although generic determinations are permitted, and the government need not justify its 7(A) refusal on a document-by-document basis, there must nevertheless be some minimally sufficient showing." *Curran*, 813 F.2d at 475. To satisfy its burden with regard to Exemption 7(A), the government must define functional categories of documents; it must conduct a document-by-document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings.[4] *See Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

If the generic index submitted by the government is not sufficient to sustain the 7(A) exemption, then the district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with enforcement proceedings. *See Campbell*, 682 F.2d at 265. Indeed, this is what the court ordered in *Bevis*, 801 F.2d at 1390. "The chief characteristic of an acceptable taxonomy should be functionality—that is, the classification should be clear enough to permit a court to ascertain 'how each . . category of documents, if disclosed, would interfere with the investigation.'" *Curran*, 813 F.2d at 475 (citing *Campbell*, 682 F.2d at 265).

---

[4] We express no opinion as to whether the categorical index submitted by the Department in this case satisfies the *Bevis* paradigm. The proceeding below was, for all intents and purposes, focused only on whether the district court could order a *Vaughn* index. On remand, the Department should submit its categorical index and affidavits in accordance with the principles set forth in this opinion.

If the categories remain too general, the district court may also examine the disputed documents *in camera* to make a first hand determination. 5 U.S.C. § 552(a)(4)(B); *Lewis*, 823 F.2d at 378; *see also Cleary v. FBI*, 811 F.2d 421, 423 (8th Cir. 1987) (*in camera* examination in 7(C) and (D) exemption case); *Parton v. United States Dep't of Justice*, 727 F.2d 774 (8th Cir. 1984); *Cox v. United States Dep't of Justice*, 576 F.2d 1302 (8th Cir. 1978).

In *Dickerson v. Department of Justice*, 992 F.2d 1426 (6th Cir. 1993), the plaintiff sought the release of information from the Hoffa FBI file and requested a *Vaughn* index. The district court accepted the government's categorical index, examined certain documents *in camera*, and granted summary judgment to the government on the basis of Exemption 7(A). The court stated that it was "satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." *Dickerson v. Department of Justice*, No. 90-CV-60045-AA, 1991 WL 337422 (E.D. Mich. July 31, 1991).

On appeal, the Court of Appeals for the Sixth Circuit reviewed the file that had been submitted to the district court and concluded that the district court had not abused its discretion in ruling that there was no need to go beyond the documents that the FBI had submitted. *Dickerson*, 992 F.2d at 1431-32. The court of appeals also held that the district court was correct in finding that the FBI's investigation remains active and that it was directed toward the institution of criminal proceedings. *Id.* at 14320 Further, the Sixth Circuit held that the district court was correct "in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution." *Id.* at 1433.

In the present case, the district court was apparently of the belief that the Department was not asserting Exemption 7(A) in good faith or that it had not individually reviewed the requested documents to place them in their functional categories. While the

district court may not order a *Vaughn* index as an aid to its review, it still must satisfy itself that the requested documents have been properly withheld. The Department's failure to demonstrate that the sought-after documents relate to an ongoing investigation or could reasonably be expected to interfere with future law enforcement proceedings will carry with it the loss of the 7(A) exemption. In that regard, we note that although the Sixth Circuit's affirmative holding on that issue in *Dickerson* will not be binding on the district court on remand, that holding does give credence to the Department's assertion of the 7(A) exemption in the present case.

In summary, Congress enacted Exemption 7(A) to prohibit interference in an ongoing criminal investigation. The Supreme Court's decision in *Robbins Tire* to allow generic category-by-category classifications in Exemption 7(A) cases, rather than detailed fact-specific explanations on a document-by-document basis, serves an important interest: "[p]rovision of the detail which a satisfactory *Vaughn* Index entails would itself probably breach the dike." *Curran*, 813 F.2d at 475. "Withal, a tightrope must be walked [in Exemption 7(A) cases]: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag." *Id.* In short, we will not allow the cure, Exemption 7(A), to "become the carrier of the disease." *Id.*

The writ of mandamus prayed for is issued. The orders directing the production of a *Vaughn* index are vacated, and the case is remanded to the district court for further proceedings consistent with this opinion.

McMILLIAN, Circuit Judge, with whom RICHARD S. ARNOLD, Chief Judge, joins, dissenting.

"Free people are, of necessity, informed; uninformed people can never be free." Sen. Judiciary Comm., Freedom of Information, 88th Cong., 1st Sess. 3 (1963) (remarks of Sen. Edward Long).

As discussed below, although I agree with much of the analysis in the majority opinion, I do not agree that the district court exceeded the scope of its authority when it ordered the Department of Justice (hereinafter the government) to prepare a *Vaughn* index of FBIHQ file 9-60052, the FBI's investigatory file concerning the investigation into the disappearance and presumed murder of Teamsters president Jimmy Hoffa in July 1975. Accordingly, I would deny the petition for writ of mandamus.

COLLATERAL ORDER

First, I do not agree that we have appellate jurisdiction to review the government's appeal, No. 91-2164. As discussed below, the term "*Vaughn* index" is derived from *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977 (1974), and a *Vaughn* index is typically a detailed affidavit which "permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information." *Id.* at 826. In my view, the district court order in the present case requiring the preparation of a *Vaughn* index was essentially a discovery order in this FOIA litigation. Discovery orders are "generally not appealable as collateral orders even when they are attacked as burdensome." *Hinton v. Department of Justice*, 844 F.2d 126, 131 (3d Cir. 1988). The *Vaughn* index is not an end in itself; by definition, the *Vaughn* index does not itself disclose anything of substance. "[A] *Vaughn* index does not accord a requester any of the substantive relief [the requester] seeks .... Rather, the [*Vaughn*] index is a tool for determining the requester's substantive rights [under FOIA]." *Id.* at 130.

It is true that "[the Freedom of Information Act (FOIA)] was not intended to supplement or displace rules of discovery." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989). However, the present case involves only the FOIA requests themselves. It is a discrete civil action. The FOIA is not being used here as a discovery tool to supplement or displace discovery

in connection with other litigation, for example, other criminal or civil proceedings. In discovery proceedings the issue is whether the information sought is relevant and necessary; however, in FOIA litigation the only issue is whether the agency has properly withheld the information sought under one of the specific statutory exemptions. *See, e.g., North v. Walsh*, 279 U.S. App. D.C. 373, 881 F.2d 1088, 1095 (1989) (FOIA request seeking documents from Office of Independent Counsel concerning on-going criminal investigation of plaintiff).

I also do not agree that the district court order is appealable under the final collateral order exception. *Hinton v. Department of Justice*, 844 F.2d at 131. Collateral orders are appealable if (1) the order conclusively decides the disputed issue, (2) the issue is entirely distinct from the merits of the case, and (3) the order would be effectively unreviewable if the appeal were postponed until the issuance of a final order. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). At this point in the present case, the district court has only ordered the preparation of a *Vaughn* index and has yet to conclusively decide the merits of the government's claim of exemption under Exemption 7(A). The district court agreed to consider the *Vaughn* index *in camera*; the district court has not even decided whether or not to disclose the *Vaughn* index itself to the public or counsel for plaintiff. As noted above, the preparation of a *Vaughn* index "does not accord a requester any of the substantive relief [he or she] seeks." *Id.* at 130. The substantive relief the requester wants is access to the government's records, not the preparation of or access to the *Vaughn* index of those records. The preparation of a *Vaughn* index is only a preliminary or preparatory step. As was noted by the panel majority opinion, the present case

> is unique because it is not a review of a district court's order that documents be disclosed, nor is it a review of a district court's decision that documents are exempt from disclo-

> sure. [The present] case asks us to determine what a district court may do while deciding whether documents are or are not exempt from disclosure.

950 F.2d at 533.

MANDAMUS

In the present case the government does not argue the district court abused its discretion in ordering a *Vaughn* index; the government argues the district court lacked the authority to order a *Vaughn* index. The government has thus presented the issue in terms of the power or authority of the district court. The government argues that Exemption 7(A) is different from other FOIA exemptions and that the district court can never require the preparation of a *Vaughn* index when the government agency invokes Exemption 7(A). As noted by the panel majority opinion, this is a novel argument that squarely challenges the authority of the district court to act. 950 F.2d at 532. Because the government has presented its argument in terms of the district court's authority to act, and not in terms of whether or not the district court abused its discretion, I agree that, under these unique circumstances, we have jurisdiction to review the district court order by petition for writ of mandamus.

THE *VAUGHN* INDEX

A healthy distrust of government, and a corresponding suspicion of government secrecy, is the underlying premise of FOIA. FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (*Robbins*). FOIA's

"general philosophy [is] 'full agency disclosure unless information is exempted under clearly delineated statutory language.'" *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976), *citing* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). "'Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information,' and therefore provided the 'specific exemptions under which disclosure could be refused.'" *John Doe Agency v. John Doe Corp* 493 U.S. at 152, *citing FBI v. Abramson*, 456 U.S. 615, 621 (1982). The statutory exemptions are to be narrowly construed, *Department of Air Force v. Rose*, 425 U.S. at 361, the district courts review the claim of exemptions de novo, and the burden of justifying nondisclosure, that is, the burden of establishing that the information requested is protected from disclosure by a specific exemption, is on the agency. *See* 5 U.S.C. § 552(a)(4)(B).

As noted by the panel majority opinion, the district court's responsibility to review de novo the government's claimed exemptions is complicated by the fact that "ordinarily a government agency, and not the court, has access to the documents in question." 950 F.2d at 533. "The party requesting the disclosure must rely upon his [or her] adversary's representations as to the material withheld, and the court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding agency's arguments." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992). This is the precise difficulty at the heart of the present case and it is also what precipitated the invention of the *Vaughn* index.

> [I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . .

> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation.

Vaughn v. Rosen, 484 F.2d at 823-24. Thus, in FOIA litigation, the plaintiff, the party seeking disclosure, is placed in the awkward and frustrating position of speculating about the likely contents of documents that it has never seen.

In *Vaughn v. Rosen* the plaintiff was a law professor doing research on the Civil Service Commission. The professor sought disclosure of the evaluations of certain government agencies' personnel management programs and certain other special reports of the Bureau of Personnel Management. The government claimed that the documents contained information of a personal nature about the government agency employees and that disclosure would constitute an invasion of the employees' personal privacy. The court of appeals noted that the plaintiff's lack of knowledge necessarily meant that he quite literally did not know, and therefore could not inform the court, whether or not the government's factual characterization of the documents as containing information of a personal nature was accurate. *Id.* at 824. The court of appeals observed that the plaintiff's lack of knowledge not only hampered his ability to litigate in the district court (he was essentially limited to arguing that the exemption is very narrow and that the general nature of the documents sought made it unlikely that they contained personal information), but

> [t]his lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, . . . and hence the typical process of dispute resolution is impossible. . . .

> The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to [FOIA]. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously, an appellate court is even less suited to making this inquiry than is a trial court.

Id. at 824-25. The FOIA requester in the present case is in the same position as the law professor in *Vaughn v. Rosen.*

The *Vaughn v. Rosen* court concluded that, contrary to the intent of Congress, FOIA "actually *encourage[d]* the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed." *Id.* at 826. Not only did FOIA contain "no inherent incentives that would affirmatively spur government agencies to disclose information," *id.*, but "since the burden of determining the justifiability of a government claim of exemption currently falls on the court system,... [FOIA] encourage[d] agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information." *Id.* These concerns compelled the *Vaughn v. Rosen* court to develop what has become known as the *Vaughn* index in order to "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." *Id.*

As noted by the panel majority opinion,

> [t]here is no prescribed form for a *Vaughn* index; any form is acceptable as long as the affidavits provided by the government assist the court's efforts to decide the issues at hand. Regardless of form, however, certain components are integral parts of any *Vaughn* index. Specifically, *Vaughn* indices usually communicate descriptions of each and every document contained in the file, including a general description of each document's contents and general facts about their creation (such as date, time, and place). For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.

950 F.2d at 533 (citations omitted). "Specificity is the defining requirement of the *Vaughn* index and affidavit; affidavits cannot support summary judgment [upholding the government's claimed exemption] if they are 'conclusory, merely reciting statutory standards, or if they are too vague or sweeping.'" *King v. United States Department of Justice*, 265 U.S. App. D.C. 62, 830 F.2d 210, 219 (1987) (footnotes omitted). "To accept an inadequately supported exemption claim 'would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review.'" *Id.* Whether the government's affidavit or affidavits constitute an adequate *Vaughn* index is a question of law reviewed de novo. *Wiener v. FBI*, 943 F.2d at 978, *citing Binion v. United States Department of Justice*, 695 F.2d 1189, 1193 (9th Cir. 1983). Preparation of the *Vaughn* index does more than require the government agency to review and classify the documents in question. The resulting *Vaughn* index is more than a litigation tool that the FOIA requester can use to challenge the government's withholding of those documents. It is important to remember that requiring the government agency to prepare a *Vaughn* index

> forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he [or she] can present his [or her] case to the trial court.

Lykins v. Department of Justice, 233 U.S. App. D.C. 349, 725 F.2d 1455, 1463 (1984). "The index thus functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Wiener v. FBI*, 943 F.2d at 977-78; *see also Davis v. CIA*, 711 F.2d 858, 861 (8th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984).

ROBBINS DECISION

As has already been discussed, Exemption 7(A) is the law enforcement exemption and provides that disclosure is not required of "matters that are . . . investigatory records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In the present case the government argues the district court lacked the authority to require the preparation of a *Vaughn* index because a *Vaughn* index is not required when Exemption 7(A) is invoked, citing *Robbins*, 437 U.S. at 223-24, 234-36. In *Robbins* the FOIA plaintiff was an employer seeking disclosure of witness statements prior to an unfair labor practice hearing. Following a contested representation election, the regional director of the NLRB filed an unfair labor practice charge against the employer for pre-election actions. A hearing was scheduled. Prior to the hearing, the employer sought disclosure of all potential witnesses' statements collected by the NLRB during its investigation. The regional director denied the request on the ground that the witness statements were exempt from disclosure under several FOIA exemptions, in particular Exemption 7(A). The

employer appealed to the NLRB General Counsel. However, before the expiration of FOIA's 20-day response period, 5 U.S.C. § 552(a)(4)(B), the employer filed a FOIA action in federal district court, seeking disclosure of the witness statements and an injunction against holding the hearing until the documents had been disclosed. The NLRB argued that witness statements were exempt from disclosure under Exemption 7(A) because their production would interfere with an enforcement proceeding, the pending unfair labor practice hearing. The district court disagreed and ordered the NLRB to produce the witness statements.

The issue whether Exemption 7(A) was generic, or categorical, or case-specific emerged on appeal. The court of appeals rejected the NLRB's categorical or generic approach and concluded that the 1974 legislative history demonstrated that Exemption 7(A) was available only after a specific evidentiary showing of the possibility of actual interference in an individual case. 563 F.2d 724, 728 (5th Cir. 1977). The court of appeals rejected the NLRB's arguments that the premature revelation of its case through the production of the witness statements before the hearing was the kind of interference that would justify nondisclosure and that pre-hearing production of witness statements would discourage potential witnesses from making statements at all. *Id.* at 729-31. The court of appeals acknowledged that the possibility of "interference" in the form of witness intimidation by the employer during the period between disclosure of the witness statements to the employer and the hearing, but held that the NLRB had failed to demonstrate that the witness statements were exempt because it had not introduced any evidence that witness intimidation was likely in this particular case. *Id.* at 732. *But see, e.g.*, *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 491 (2d Cir.) (holding statements of employees and union representatives obtained in NLRB investigation exempt from disclosure under Exemption 7(A) until completion of administrative and judicial proceedings), *cert. denied*, 429 U.S. 834 (1976).

The Supreme Court reversed. The Court endorsed the generic, or categorical, interpretation of Exemption 7(A) and held that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing." 437 U.S. at 236. First, the Court noted that the language of the exemption, specifically the plural reference to "enforcement proceedings," suggested that "certain generic determinations" might be made under Exemption 7(A). *Id.* at 224. The Court concluded that the early legislative history supported this interpretation, *id.* at 225-26 (referring to Sen. Humphrey's concerns in 1966 about the need to protect statements of agency witnesses from disclosure prior to agency proceedings, specifically witnesses in unfair labor practice proceedings), as well as the reported decisions until 1974. *Id.* at 226 (citing cases). The Court also noted that the legislative history of the 1974 amendment of Exemption 7 showed "[t]hat the 1974 Congress did not mean to undercut the intent of the 1966 Congress with respect to Senator Humphrey's concern about interference with pending NLRB enforcement proceedings." *Id.* at 232; *see id.* at 226-32 (noting background of 1974 amendment, particularly Congressional disapproval of several D.C. Cir. decisions upholding "blanket exemptions" for all government records contained in investigatory files that had been compiled for law enforcement purposes; 1974 amendment changed scope of exemption from "files" to "records" and enumerated specific purposes and objectives of exemption).

The Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of law enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" *Id.* at 236. The Court agreed that "[t]he most obvious risk of interference with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them

change their testimony or not testify at all." *Id.* at 239. In addition, prehearing disclosure of witnesses' statements "would disturb the existing balance of relations in unfair labor practice proceedings," *id.* at 236, especially since, "[h]istorically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case." *Id.* The Court also noted that the use of FOIA as the mechanism for providing a litigant with earlier and greater access to the agency's case than the litigant would otherwise have was likely to cause substantial delays in the administrative process and thus interfere with enforcement proceedings. *Id.* at 237-38.[5]

APPLICATION OF EXEMPTION 7(A)

I do not think *Robbins* supports the government's argument in the present case. As noted by the panel majority opinion, after *Robbins* endorsed the generic, or categorical, application of Exemption 7(A), many courts of appeals

> altered their views on the need for a *Vaughn* index when Exemption 7(A) is involved. The rationale underlying these post-*Robbins* decisions has been that a Vaughn index

---

[5] As noted by the majority opinion, slip op. at 9-12 *supra*, the Supreme Court recently affirmed the *Robbins* categorical approach in *United States Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2021, 2023-24 (1993) (rejecting blanket exemption for "all" FBI sources as confidential for purposes of Exemption 7(D); however, "more narrowly defined circumstances" may support inference of confidentiality, for example, generic category of paid informants). *See also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (holding "rap sheets" constituted generic category of law enforcement records which could reasonably be expected to constitute an unwarranted invasion of privacy within meaning of Exemption 7(C)). I do not dispute the continued validity of the *Robbins* categorical approach. What is in dispute in the present case is whether, as a threshold matter, we know enough about the nature of the records in question to review the accuracy of the government's classification of the records into generic categories. I submit that we do not.

is unnecessary because the government is permitted to demonstrate interference based on categories of documents and need not demonstrate interference with enforcement proceedings on a document-by-document basis. *E.g. Church of Scientology v. IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986) (Scalia, J.); *Barney v. IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980) (per curiam). Moreover, in each of these cases, the appellate court was reviewing a district court's decision *not* to require a *Vaughn* index when the government had already provided adequate descriptions of the documents sought, as well as adequate explanations as to how the particular types of documents at issue could interfere with law enforcement proceedings.

At no time, however, has an appellate court suggested that *Robbins* alters the district court's statutory obligation to review the claimed exemption's applicability. *Robbins* does not allow for exemption merely because documents appear in a law enforcement agency's file. When an agency relies upon *Robbins* and offers categorical justifications for exemption under Exemption 7(A), the agency must still review each document individually.... The district court is well within its authority to verify that the agency has actually examined and properly categorized each document. It may accomplish this task by requiring an affidavit that describes, on a document-by-document basis, the documents in the file, the categories into which each document is placed, and a description of how disclosure of each category of documents might interfere with enforcement proceedings. *Robbins* merely prevents a district court from ordering a document-by-document explanation as to how each document will interfere with enforcement proceedings. In other words, though the district court cannot require the government to justify its decision to deny disclosure on a document-by-document basis, it can require the govern-

> ment to justify its chosen categorization on a document-by-document basis.

950 F.2d at 533-34 (parenthetical omitted from *Barney* citation; citations omitted; footnote omitted).

In *Robbins* it was not disputed that the documents in question were in fact witness statements. Nor was it disputed in *Robbins* that, at least in general, disclosure of witness statements prior to the unfair labor practice proceeding could interfere with that proceeding. What was disputed was whether the agency could rely on that generality or whether the agency had to make a specific factual showing that disclosure of those particular witness statements would interfere with that particular proceeding. Similarly, in *Barney v. IRS*, there was no dispute about the categorization of the documents in question; the district court and this court were "satisfied that the government's affidavits adequately described the documents, the categories to which they belonged, and the possible harms of disclosure." 950 F.2d at 534, *citing* 618 F.2d at 1272-73 (witness statements, documentary evidence, IRS agent's work papers, internal agency memoranda). *See Curran v. Department of Justice*, 813 F.2d 473, 476 (1st Cir. 1987) (apparent from agency affidavit that agency conducted individualized, document-by-document search, subdivided records into types and then into functional categories).

The same cannot be said in the present case. Here, the parties disputed not only the nature of the individual documents, but also the type of category used by the government, as well as the appropriate categorization or placement of the documents into particular categories. This basic lack of agreement about the nature and categorization of the documents distinguishes the present case from *Robbins* and *Barney*.

In the present case, the district court required preparation of a *Vaughn* index, and in response the government filed several

public affidavits or declarations and a document which it captioned a "categorical index." The district court was clearly not satisfied with the government's response. As noted by the panel majority opinion, "[t]he district court's dissatisfaction [with the government's response was] understandable given the government's blanket assertion that all 13, 800 documents, accumulated over a 15-year span, fit neatly into nine categories described over the course of five pages. " *Id.* at 535; *cf. Weiner v. FBI*, 943 F.2d at 978 (noting the FBI's use of "boilerplate" explanations drawn from a "master" FOIA response). Furthermore, the district court believed that the FOIA requester had raised serious questions about the validity of the government's search and categorization of the documents. *Id. Compare Curran v. Department of Justice*, 813 F. 2d at 476 (district court found no reason to impugn good faith of agency). The district court also concluded that it needed additional information "about each document, not only to verify that the government has fulfilled its obligation to examine each document, but also to enable it to understand or challenge the categories created by the government." 950 F. 2d at 535.

By requiring the preparation of a *Vaughn* index in the present case, the district court was attempting to develop an adequate record. Only the government knows what is in the Hoffa file; the FOIA requester and the district court do not know, much less this court. As noted above, the record indicates only that the file consists of at least 13, 800 pages in 70 volumes; the file is almost certainly larger now. Some of these pages are public source material which the government has already made available to the FOIA requester. According to the categorical index, which consists of a total of five double-spaced pages, each and every page falls within one of nine categories, the disclosure of which could reasonably be expected to interfere with law enforcement proceedings. The district court's dissatisfaction with the categorical index was directed more at the procedural and substantive accuracy of the government's classification of individual

pages than at the categories identified by the government. (The majority opinion expresses no opinion on the sufficiency of the Baker affidavit and the categorical index. *See* slip op. at 14 n.4 *supra*.) In any event, as noted by the panel majority opinion, the district court's concern about whether all the documents are described by the government's categories cannot be resolved merely by requiring more specific or more detailed categories. 950 F.2d at 535.

In my view, assuming for purposes of analysis that the government's categories are sufficiently specific, the district court acted within its authority in requiring the government to verify that it had actually examined and accurately categorized each document. Indeed, it was its duty to do so. *King v. United States Department of Justice*, 830 F.2d at 219 (acceptance of inadequately supported exemption claim "would constitute abandonment of the trial court's obligation under FOIA to conduct a *de novo* review"). The district court did not know (and we do not know) whether the government's categorization of the documents was correct or, for that matter, whether the government had examined each document individually. The district court decided that, without a *Vaughn* index, it could not verify whether there was a correlation between the documents and the categories. Because all the documents necessarily fall into exempt categories, unless the district court can verify that each document has been examined and accurately categorized, the *Robbins* categories will become "no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendments of FOIA." *Bevis v. Department of State*, 255 U.S. App. D.C. 347, 801 F.2d 1386, 1389 (1986), *citing Robbins*, 437 U.S. at 236.

As noted by the panel majority opinion, preparation of a *Vaughn* index in the present case does not require the government to demonstrate document-by-document how disclosure of each document could reasonably be expected to interfere with

pending law enforcement proceedings. 950 F.2d at 535. Like the district court and the panel majority, I accept the category-by-category approach. What I do not accept is the government's conclusory assertions that each and every document in the Hoffa file falls within one of its nine categories. In other words, what is disputed, and what the district court sought to verify by requiring the preparation of a *Vaughn* index, is whether the government's categorization of each document is accurate. Without such a record, the FOIA requester cannot test the government's claim of exemption, the district court cannot conduct the required de novo review of the government's decision not to disclose (without undertaking the arduous task of actually reviewing the documents itself), and this court cannot conduct a meaningful review of the district court's decision.

It should be noted that the district court could decide to modify its order requiring the government to prepare a *Vaughn* index for the entire Hoffa file. In the proceedings before the district court, the government argued that preparation of a *Vaughn* index for the entire Hoffa file would be inordinately time-consuming and would necessarily divert scarce resources from other law enforcement activities. The district court could require the government to prepare a *Vaughn* index for a representative sample of the documents in the Hoffa file. "Representative sampling is an appropriate procedure to test an agency's FOIA exemption claims when a large number of documents are involved." *Bonner v. United States Department of State*, 289 U.S. App. D.C. 56, 928 F.2d 1148, 1151 (1991); *accord The Washington Post v. United States Department of Defense*, 766 F. Supp. 1, 15 (D.D.C. 1991).

Alternatively, the district court could decide to conduct an *in camera* review of a representative sample of the documents in the Hoffa file. *In camera* review is discretionary. *Robbins*, 437 U.S. at 224. Limited *in camera* review might be particularly helpful in the present case. "[A] finding of bad faith or contrary evidence is not a prerequisite to *in camera* review; a trial judge

may order such an inspection 'on the basis of an uneasiness/ on a doubt [the judge] wants satisfied before [taking] responsibility for a de novo determination.'" *Meeropol v. Meese*, 252 U.S. App. D.C. 381, 790 F.2d 942, 958 (1986), *citing Ray v. Turner*, 190 U.S. App. D.C. 290, 587 F.2d 1187, 1195 (1978). One district judge and one appellate panel have examined *in camera* a selection *made by the government* of the documents contained in the Hoffa file and concluded that those documents established that the criminal investigation into Hoffa's disappearance is active and continuing and that production of those records could reasonably be expected to interfere with enforcement proceedings. *Dickerson v. Department of Justice*, No. 90-CV-60045-AA, 1991 WL 337422, slip op. at 5-6 (E.D. Mich. July 31, 1991), *aff'd*, 992 F.2d 1426 (6th Cir. 1993).

For the reasons set forth above, I would hold the district court has the authority to require the government to prepare a *Vaughn* index even when Exemption 7(A) is invoked and would deny the government's application for writ of mandamus.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2080

In re: Department of Justice,
Petitioner.

Petition for Writ of Mandamus.

No. 91-2164EM

Barbara Ann Crancer,
Appellee,

v.

United States Department of Justice,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: September 12, 1991
Filed: December 2, 1991

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

In case number 91-2164EM, the Department of Justice (DOJ) appeals the district court's[1] order that it produce a *Vaughn*[2] index to describe records requested by Barbara Ann Crancer (Crancer) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. S 552 (1988).[3] In case number 91-2080, the DOJ alternatively seeks a writ of mandamus prohibiting the district court from ordering production of the *Vaughn* index. We dismiss the interlocutory appeal and deny the application for a writ of mandamus.

I. BACKGROUND

Jimmy Hoffa, the former president of the International Brotherhood of Teamsters, disappeared in Michigan in July 1975. The FBI began and, apparently, is still conducting, an investigation into Hoffa's disappearance. As a result of these investigative efforts, the FBI has accumulated over 13,800 pages of records relating to this matter.

In February 1987, Crancer, who is Hoffa's daughter, filed an FOIA request with the DOJ, seeking materials about an individual who allegedly gave information about Hoffa's disappearance to the FBI. Crancer's request was denied on the basis of Exemption 7(A) of the FOIA, which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

In February 1989, after all administrative appeals were denied, Crancer filed suit in district court to obtain an order

---

[1] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

[2] *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[3] All future references to the United States Code will be to the 1988 version unless otherwise stated.

compelling the DOJ to provide her with the documents she requested. While that suit was pending, Crancer submitted a second information request that sought any and all documents relating to the FBI's investigation into Hoffa's disappearance. After this request was denied, Crancer amended her lawsuit to include the broader request.

In June 1990, the DOJ moved for summary judgment; one month later, the district court ordered the DOJ to provide Crancer with a *Vaughn* index within thirty days for her to use in opposing the summary judgment motion. The DOJ moved for reconsideration; the district court refused to rescind its order but did grant the DOJ more time to produce the index. In October 1990, the DOJ asked the district court to modify its order and allow the DOJ to provide only the categories of documents contained in the Hoffa file. At the same time, the DOJ submitted a list of nine categories that purported to describe all the documents in the file and an affidavit that described the potential harm to enforcement activities if these categories of documents were released.

The district court denied this request in January of 1991 and gave the DOJ twenty days to prepare a full index and submit it to a magistrate judge for *in camera* review. One month later, the DOJ asked the magistrate judge for alternate relief and proposed to allow the magistrate judge to review the actual documents *in camera*. In March, the magistrate judge denied this request, but afforded-the DOJ more time to prepare the index; the index was to be completed in one year, with 25% of the index to be submitted to the court every three months. On April 4, 1991, the DOJ asked the district court to reconsider the magistrate judge's order or, in the alternative, certify the matter for interlocutory appeal. The district court denied these motions two weeks later, and the matter has now been brought to this court.

II. DISCUSSION

A. Jurisdiction

We must begin by deciding whether this court has jurisdiction to hear this case, either as an interlocutory appeal or as an action seeking a writ of mandamus. We conclude that the unique characteristics of this case allow us, on this occasion, to decide the issues presented by the DOJ.

Mandamus is an extraordinary remedy that is "available only in those exceptional circumstances amounting to a judicial usurpation of power," *In re Ford Motor Co.*, 751 F.2d 274, 275 (8th Cir. 1984), or "where the district court exceeds 'the sphere of its discretionary power.'" *In re Cessna Distrib. Antitrust Litig.*, 532 F.2d 64, 68 (8th Cir. 1976) (quoting *Will v. United States*, 389 U.S. 90, 104 (1967)). "Other factors which bear on the appropriateness of mandamus review include the need to correct error which is likely to recur and to provide guidelines for the resolution of novel and important questions." *Central Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1212 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

Crancer contends that it is within the district court's discretion to order creation of a *Vaughn* index, and consequently the court did not act outside its jurisdiction in ordering the DOJ to create an index in this case. The DOJ argues that Exemption 7(A) is different from other exemptions due to case law from the Supreme Court, this court, and other courts of appeal that indicates it is never appropriate for a district court to require a *Vaughn* index when the government agency invokes Exemption 7(A).[4]

[4] It is this point that differentiates this case from *Hinton v. Department of Justice*, 844 F.2d 126 (3d Cir. 1988), which Crancer proffers to demonstrate that the district court's decision is not reviewable through mandamus. In *Hinton*, the DOJ withheld documents based on Exemptions 7(C) and 7(D) and did not contend that the district court lacked the power or authority to require a *Vaughn* index when Exemption 7(A) is invoked. *See id.* at 128.

The DOJ's argument is a novel one and has not been directly addressed by any court. If the DOJ is correct in its contention that the district court lacked authority to order a *Vaughn* index, then a writ would be the proper remedy. Because the issue of whether the writ is available is intertwined with the merits of this interlocutory matter, we must decide whether the district court had authority to require a *Vaughn*-type index in these circumstances. *Cf. In re Brotherhood of Ry.. Airline and S.S. Clerks*, 605 F.2d 1073, 1074 (8th Cir. 1979) (per curiam) (deciding to reach merits of dispute because "[i]f the District Court was without jurisdiction to issue the . . . order, a court of appeals has jurisdiction to dissolve that order by means of a writ of mandamus.").[5]

B. Use of *Vaughn* Indices and Exemption 7(A)

This case is unique because it is not a review of a district court's order that documents be disclosed, nor is it a review of a district court's decision that documents are exempt from disclosure. This case asks us to determine what a district court may do while deciding whether documents are or are not exempt from disclosure.

The district court has the responsibility to review the applicability of the government's claimed exemption *de novo*. 5 U.S.C. S 552(a)(4)(B). This task is difficult because ordinarily a government agency, and not the court, has access to the documents in question. The seminal case of *Vaughn v. Rosen* articulated concerns about the need to find a mechanism that would "permit

---

[5] Because of this holding, we need not decide whether the collateral order doctrine allows us to entertain this appeal. Consequently, we dismiss the appeal in case number 91-2164EM without deciding whether the collateral order doctrine applies to this case. We also point out that the analysis and outcome of this case would not differ if the collateral order doctrine were applied, so the government is not prejudiced by our decision to dismiss the appeal.

the court system effectively and efficiently to evaluate the factual nature of disputed information." *Vaughn*, 484 F.2d at 826. From these concerns, the D.C. Circuit created what is now known as a *Vaughn* index, which does nothing more than "correlate statements made in the Government's refusal justification with the actual portions of the document." *Id.* at 827 (footnote omitted). Currently, a *Vaughn* index is understood to perform three important tasks:

> [I]t forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.

Lykins v. Department of Justice, 725 F.2d 1455, 1463 (D.C. Cir. 1984).

There is no prescribed form for a *Vaughn* index; any form is acceptable as long as the affidavits provided by the government assist the court's efforts to decide the issues at hand. *See, e.g.*, *Keys v. Department of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987). Regardless of form, however, certain components are integral parts of any *Vaughn* index. Specifically, *Vaughn* indices usually communicate descriptions of each and every document contained in the file, including a general description of each document's contents and general facts about their creation (such as date, time, and place). For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.[6]

---

[6] A sample index for a single document appears as an appendix to the Third Circuit's decision in *Conoco Inc. v. Department of Justice*, 687 F.2d 724, 730-32 (3d Cir. 1982).

The government argues the district court lacks the authority to require a *Vaughn* index because such an index is not required when Exemption 7(A) is invoked. The Supreme Court has indicated that with respect to Exemption 7(A), the government need not point to a particularized harm to a particular enforcement proceeding; instead, the government may argue (and courts may hold) that certain general categories of documents will typically interfere with enforcement proceedings if the documents are disclosed. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223-24, 236 (1978). In the wake of *Robbins*, many courts of appeal have altered their views on the need for a *Vaughn* index when Exemption 7(A) is involved. The rationale underlying these post-*Robbins* decisions has been that a *Vaughn* index is unnecessary because the government is permitted to demonstrate interference based on categories of documents and need not demonstrate interference with enforcement proceedings on a document-by-document basis. *E.g.*, *Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986) (Scalia, J.); *Barney v. IRS*, 618 F.2d 1268, 1273 (8th Cir. 1980) (per curiam) ("Under exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding."). Moreover, in each of these cases, the appellate court was reviewing a district court's decision *not* to require a *Vaughn* index when the government had already provided adequate descriptions of the documents sought, as well as adequate explanations as to how the particular types of documents at issue could interfere with law enforcement proceedings. *E.g.*, *Wright v. OSHA*, 822 F.2d 642, 647 (7th Cir. 1987); *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987); *Curran v. Department of Justice*, 813 F.2d 473, 476 (1st Cir. 1987).

At no time, however, has an appellate court suggested that *Robbins* alters the district court's statutory obligation to review the claimed exemption's applicability. *Robbins* does not allow for exemption merely because documents appear in a law en-

forcement agency's file. *E.g.*, *Curran*, 813 F.2d at 475; *Crooker v. Bureau of Alcohol Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986). When an agency relies upon *Robbins* and offers categorical justifications for exemption under Exemption 7(A), the agency must still review each document individually. *Bevis v. Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986). More specifically, the agency must perform the following tasks:

> First, it must define its categories functionally. Second, it must conduct a document-by-document review in order to assign documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings.

Id. at 1389-90. The district court is well within its authority to verify that the agency has actually examined and properly categorized each document. It may accomplish this tack by requiring an affidavit that describes, on a document-by-document basis, the documents in the file, the categories into which each document is placed, and a description of how disclosure of each category of documents might interfere with enforcement proceedings.[7] *Robbins* merely prevents a district court from ordering a document-by-document explanation as to how each document will interfere with enforcement proceedings. In other words, though the district court cannot require the government to justify its decision to deny disclosure on a document-by-document basis, it can require the government to justify its chosen categorization on a document-by-document basis. Furthermore, the district court has the authority to verify that the

---

[7] We do not suggest any particular degree of specificity that may be required, preferring to leave such decisions to the district courts' discretion to be exercised on a case-by-case basis.

government has fullfilled its obligation to examine each document individually.[8]

The government argues that our decision in *Barney* prohibits the district court from entering the order at issue here. We disagree. In *Barney*, the district court granted summary judgement in favor of the government without requiring the government create a *Vaughn* index. We affirmed the grant of summary judgment despite the lack of a *Vaughn* index because both we and the district court were satisfied that the government's affidavits adequately described the documents, the categories to which they belonged, and the possible harms of disclosure. *Id.* at 1272-73. If the district court is not provided with these materials, or if it finds the materials provided by the government to be insufficient, the district court must be permitted to require further information from the government.

In the case at bar, the record clearly indicates that the district court was not satisfied with the affidavits supplied by the government. The district court's dissatisfaction is understandable given the government's blanket assertion that all 13,800 documents, accumulated over a 15-year span, fit neatly into nine categories described over the course of five pages. Furthermore, Crancer raised arguments that, in the district court's belief, raised serious questions about the validity of the government's search and categorization. The district court has the discretion to require further categorization as well as assurances that all the

---

[8] The district court does have the authority to conduct an *in camera* review, 5 U.S.C. S 552(a)(4)(B). Although it may be argued that *in camera* review might have settled this entire matter, we have indicated that such a procedure should rarely be used because it disrupts the traditional adversarial process and because it represents an enormous drain on limited judicial resources. *E.g.*, *Cox v. United States Department of Justice*, 576 F.2d 1302, 1311-12 (8th Cir. 1978). In light of *Cox*, and in light of the sheer size of this file, we cannot fault the district court for refusing to accept the government's offer to permit an *in camera* review.

documents actually belong in the categories. Moreover, the court may believe it needs information about each document, not only to verify that the government has fulfilled its obligation to examine each document, but also to enable it to understand or challenge the categories created by the government.[9] If the district court is unable to verify that the government has examined and correctly categorized each document, Exemption 7(A) will once again become a *de facto* blanket exemption of all documents in law enforcement files. *See Bevis*, 801 F.2d at 1389 ("Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA.").

These concerns cannot be alleviated by simply requiring the government to provide "more specific, distinct categories" as suggested by the dissent, *post* at 15. Further categorization is an appropriate remedy when the district court finds the categories inadequate, confusing, or otherwise unhelpful. The case at bar does not present such a situation; instead, the concern at issue is whether all the documents in the file are described by the government's categories. This issue cannot be resolved by requiring further categorization. Similarly, we do not agree with the dissent's view that "[t]he threat of disclosure . . . motivates the government to make a proper showing that the exemption applies." *Post* at 15. In a situation similar to this one, where the district court finds itself presented with an insufficient record upon which to make a ruling, the district court is unlikely to simply order disclosure. Even if the court were to order disclosure, it is quite likely that this court would remand the case for further development of the record, thereby saddling the district court with an inadequate record and no mechanism to insure the

---

[9] For instance, the court may believe that 15-year old witness statements do not belong in the same category as 6-month old witness statements. However, the court would be unable to differentiate between the two unless it had information about each witness statement in the file.

government's categories accurately reflect the true contents of the file. Without an index to perform this vital function, the district court will be forced to accept the government's contentions with little to no scrutiny. Consequently, we believe the effect of the dissenting opinion would be to return "blanket status" to Exemption 7(A) and deny meaningful disclosure whenever the exemption is invoked, despite Congress' intent to the contrary.

The government also argues that the same court that decided *Vaughn v. Rosen* has said that *Vaughn* indices are inappropriate when Exemption 7(A) is invoked. A careful reading of these cases, however, indicates that the D.C. Circuit only disapproves the use of *Vaughn* indices insofar as they would be used to demonstrate how each document would actually interfere with enforcement proceedings. *See, e.g., Church of Scientology*, 792 F.2d at 152 ("A *Vaughn* index would have served no purpose since . . . Exemption 7(A) . . . did not require a showing that each individual document would produce such interference . . . ."); *Crooker*, 789 F.2d at 67 ("Because generic determinations [of interference] are permitted, the government need not justify its withholdings document-by-document . . . ."). No case from the D.C. Circuit (or from any other circuit) has prohibited a district court from requiring descriptions of a file's contents on a document-by-document basis. In fact, the D.C. Circuit has confirmed the government's obligations to review all the documents in a requested file and explain how each document fits into the categories chosen by the government. *See Bevis*, 801 F.2d at 1389-90. Given this obligation, and given the district court's duty to conduct a *de novo* review of the government's decision to not disclose documents, district courts must be able to ask for this type of document-by-document information. Otherwise, district courts will be nothing more than rubber stamps for the government's decision to deny disclosure. The FOIA does not permit such a limited role for the district courts.

Having concluded that it is within the district court's power and discretion to order a document-by-document index, we cannot grant the government's application for a writ of mandamus. *Central Micofilm*, 688 F.2d at 1212. ("[A]rguable error within the scope of trial court discretion is not a proper basis for mandamus.").

III. CONCLUSION

Although we agree that invocation of Exemption 7(A) may alter the form of the *Vaughn* index, Exemption 7(A) does not eliminate the need for some mechanism to perform the functions historically associated with an index. Consistent with this opinion, it lies within the district court's power to order the government to produce a *Vaughn* index when Exemption 7(A) is invoked. Furthermore, the district court did not abuse its discretion in doing so in this case. Consequently, we deny the application for writ of mandamus and dismiss the interlocutory appeal.

WOLLMAN, Circuit Judge, dissenting.

The majority has decided that it is within the district court's authority to order the government to produce a *Vaughn* index when exemption 7(A) is invoked. I respectfully dissent.

The majority agrees that *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), and its progeny prohibit a district court from requiring the government to justify its decision to deny disclosure on a document-by-document basis. The majority attempts to avoid this prohibition, however, by holding that although a district court may not require a specific factual showing and explanation describing why each document is exempt, it may require a specific factual showing as to why each document belongs in a category, along with an explanation describing why the category itself is exempt. How the government can make the latter showing without being required to make the prohibited showing, the majority does not tell us.

I see no practical difference between an explanation why each document is exempt and an explanation why each category of similar documents is exempt. In both cases, the government must first provide specific factual information concerning each document, "including a general description of each document's contents and general facts about their creation (such as date, time, and place)." Majority op. at 6-7. Instead of an individual explanation for non-disclosure of each document, however, the majority would require a categorical explanation for non-disclosure. Because each document must fit into a distinct category of the same or similar documents, *id.* at 8, the categorical explanation for non-disclosure must necessarily be the same or similar as the individual explanations that *Robbins Tire* prohibits.

In addition, the majority reads our decision in *Barney v. IRS*, 618 F.2d 1268 (8th Cir. 1980), too narrowly. The majority interprets *Barney* to mean that specific factual information may be required if the district court is unsatisfied with the government's showing that exemption 7(A) applies. Majority op. at 9. *Barney*, however, holds that "[u]nder exemption 7(A) the government is *not required to make a specific factual showing with respect to each withheld document* that disclosure would actually interfere with a particular enforcement proceeding." *Id.* at 1273 (emphasis added) (citing *Robbins Tire*, 437 U.S. at 234-35). Other circuits have said the same. *See, e.g., Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987); *Curran v. Department of Justice*, 813 F.2d 473, 475 (1st Cir. 1987); *Church of Scientology of California v. I.R.S.*, 792 F.2d 146, 152 (D.C. Cir. 1986); *Campbell v. Department of Health and Human Services*, 682 F.2d 256, 265 (D.C. Cir. 1982).

Under FOIA, the government is required to release requested information unless a limited exemption applies. *See Curran*, 813 F.2d at 473. The government has the burden of demonstrating that the withheld documents are exempt from disclosure, 5

U.S.C. § 552(a)(4)(B), and the district court must make a de novo determination as to whether an exemption applies. *Id.* To meet its burden, however, the government need not provide specific factual information document-by-document, as *Barney* clearly holds. The majority decision severely undermines, if not completely overrules, *Barney*.

In *Robbins Tire*, the Supreme Court pointed out that the very language of exemption 7(A) contemplates that generic determinations be made and that exemption 7(A) is to be treated differently from other exemptions. 437 U.S. at 223-24. The District of Columbia Circuit has reasoned that

> [w]hen . . . a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile. Thus, in *NLRB v. Robbins Tire & Rubber Co.*, [citation omitted] the Supreme Court upheld, without any provision of a *Vaughn* index, the Labor Board's refusal to provide under FOIA witness statements obtained in the investigation of pending unfair labor practice proceedings. A *Vaughn* index would have served no purpose since . . . Exemption 7(A) did not require a showing that each individual document would produce such interference, but could rather be applied generically, to classes of records such as witness statements.

Church of Scientology, 792 F.2d at 152 (Scalia, J.). Moreover, under exemption 7(A), "'the inherent nature of the requested documents is irrelevant to the question of exemption'" *Curran*, 813 F.2d at 474 (quoting *Irons v. FBI*, 811 F.2d 681, 685 (lst Cir. 1987)). Thus, by holding that the government may be required to provide specific factual information on a document-by-document basis under this generic exclusion, the majority opinion nullifies the exemption that 7(A) was intended to provide.

The majority contends that its holding is necessary in order to insure that exemption 7(A) does not again become a blanket exemption, arguing that a *Vaughn* index helps to avoid this result by allowing the district court to "verify that the government has examined and correctly categorized each document." Majority op. at 10. This concern is misplaced. First, we have stated that "'[t]he federal courts and federal judges are ill-suited to assume the role of super-administrator in FOIA cases.'" *Cleary v. FBI*, 811 F.2d 421, 423 (8th Cir. 1987) (citation omitted). Second, if the government cannot meet its burden of demonstrating that the information is exempt, then the district court remains free to simply deny the exemption. The threat of disclosure, therefore, motivates the government to make a proper showing that the exemption applies.

If the generic index submitted by the government is not sufficient to sustain the 7(A) exemption, then the district court may request more specific, distinct categories so that the court can determine how each category might interfere with the investigation. Indeed, this is exactly what the District of Columbia Circuit ordered in *Bevis v. Department of State*, 801 F.2d 1386, 1390 (D.C. Cir. 1986), a case upon which the majority relies for the proposition that the agency must individually review each document. While the agency must review each document to determine its proper categorical placement, *id.* at 1389, the agency is not required to provide specific factual information about each document. *See Campbell*, 682 F.2d at 265.

If the categories remain too general, the court may also examine the disputed documents *in camera* to make a first hand determination. 5 U.S.C. § 552(a)(4)(B); *Lewis*, 823 F.2d at 379; *Cleary*, 811 F.2d at 423 (citation omitted) (the court should utilize "an *in camera* examination of the [material] itself as an aid in determining whether the Government's affidavits are accurate

and made in good faith"); *Bevis*, 801 F.2d at 1390. The remedy is not, however, resort to a *Vaughn* index.[10]

Congress enacted exemption 7(A) to prohibit interference in an ongoing criminal investigation. The Supreme Court's decision in *Robbins* to allow generic category-by-category indices in Exemption 7(A) cases, rather than requiring detailed factual information on a document-by-document basis, serves an important interest: when government confidentiality is at stake during an investigation, "provision of the detail which a satisfactory *Vaughn* index entails would itself probably breach the dike." *Curran*, 813 F.2d at 475. In short, the requirement of a *Vaughn* index in these cases will cause the cure, exemption 7(A), "to become the carrier of the disease." *Id.*

I would reverse the district court's order.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

[10] In *Dickerson v. Department of Justice*, No. 91-060045 (E.D. Mich. July 31, 1991), the plaintiff sought the release of information from the Hoffa FBI file and requested a *Vaughn* index. The court accepted the government's categorical index, examined certain documents *in camera*, and granted summary judgment to the government on the basis of exemption 7(A). The court stated that it is "satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." Moreover the court held that "*in camera* inspection mandates that the FBI files not be disclosed." In the instant case, the district court refused the opportunity to view documents *in camera*.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89 - 0234 C (5)

BARBARA ANN CRANCER,
Plaintiff,

vs.

DEPARTMENT OF JUSTICE,
Defendant.

ORDER

[Filed: July 27, 1990]

Upon consideration of plaintiff's motion to compel and the cases cited therein,

IT IS HEREBY ORDERED that plaintiff's motion to compel preparation of a Vaughn Index is **GRANTED**.

IT IS FURTHER ORDERED that the United States Department of Justice shall serve upon plaintiff within thirty (30) days of the date of this order an itemized, indexed inventory of every agency record or portion thereof responsive to plaintiff's FOIA request which defendant asserts to be exempt from disclosure, accompanied by a detailed justification statement covering each refusal to release said agency records or portions thereof in accordance with the indexing requirements outlined in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). *See, Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978).

IT IS FURTHER ORDERED that plaintiff shall show cause within twenty (20) days from the date defendant files its Vaughn Index why the Court should not grant defendant's motion for summary judgment.

IT IS FINALLY ORDERED that defendant's motion for summary judgment is **HELD IN ABEYANCE** until such time when the terms of this Order are complied with.

Dated this 27th day of July, 1990.

/s/ Stephen N. Limbaugh
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89 - 0234 C (5)

BARBARA ANN CRANCER,
Plaintiff,

vs.

DEPARTMENT OF JUSTICE,
Defendant.

ORDER

[Filed: Aug. 16, 1990]

This matter is before the Court on defendant's motion to reconsider this Court's July 27, 1990 Order in which the Court ordered defendant to serve upon plaintiff within thirty days a *Vaughn* index. In defendant's motion to reconsider, defendant maintains that this Court has already denied plaintiff's motion to compel a *Vaughn* index as moot. On February 26, 1990 the Court granted plaintiff's leave to file a first-amended complaint. The Court also ordered that all other pending motions were denied as moot, as plaintiff would be filing a first-amended complaint. When the Court issued that order denying all other pending motions as moot, the Court intended only to deny those motions that were directly affected by the amendment of the complaint, i.e., a motion for summary judgment, motion for partial summary judgment and motion to dismiss. The Court did not intend to include plaintiff's motion to compel the *Vaughn* index within that order because nothing in the first-amended complaint could have affected plaintiff's motion to compel. As there does appear to be some confusion regarding the matter, however, the Court will enter an order *nunc pro tunc* clarifying that all other pending

motions were denied as moot except for plaintiff's motion to compel a *Vaughn* index, thereby leaving that motion viable.

Upon consideration of the remainder of defendant's motion to reconsider, the Court concludes it is also without merit. The Court finds the case law is clear that it is unfair for a plaintiff to be expected to pursue her suit regarding a FOIA request when plaintiff is completely left in the dark regarding the information she seeks. If plaintiff does not have access to the information provided through the *Vaughn* index, she will be unable to intelligently oppose defendant's motion for summary judgment. Defendant is not permitted to rest on its conclusory statement that the documents plaintiff wishes come under some exception to the FOIA rules. The purpose of the *Vaughn* index, as set forth in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), is to alleviate this very type of problem. Thus, in accordance with the clear weight of authority, the Court will deny defendant's motion to reconsider.

Accordingly,

IT IS HEREBY ORDERED ***nunc pro tunc*** that this Court's order of February 26, 1990 is corrected to read "**IT IS FURTHER ORDERED** that all other pending motions are DENIED as moot, except for plaintiff's motion to compel preparation of *Vaughn* index, as plaintiff will be filing a first-amended complaint." This corrected order remains effective as of February 26, 1990.

IT IS FURTHER ORDERED that defendant's motion to reconsider this Court's July 27, 1990 Order is **DENIED**.

Dated this 16th day of August, 1990.

/s/ Stephen N. Limbaugh
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-0234-C-5

BARBARA ANN CRANCER,
Plaintiff,

vs.

DEPARTMENT OF JUSTICE,
Defendant.

MEMORANDUM AND ORDER

Plaintiff, the daughter of James R. Hoffa, brings this suit against the Department of Justice to challenge its denial of her Freedom of Information requests for FBI documents regarding the disappearance of her father.

The Freedom of Information Act provides for disclosure of agency records upon request. 5 U.S.C. § 552(a). The Act also enumerates nine categories of records that may be withheld from disclosure. 5 U.S.C. §552(b). Defendant asserts that exemption (b)(7)(A) applies. Defendant contends that the information was compiled for law enforcement purposes and that production of the records could reasonably be expected to interfere with enforcement proceedings. *Id.*

On July 27, 1990, the Court ordered defendant to prepare an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), to justify withholding of documents to plaintiff. The purpose of a detailed *Vaughn* index is to permit meaningful review of the agency's claim of exemption by the party seeking disclosure and the Court. Defendant responded on August 1, 1990, by moving the Court to reconsider its earlier orders,

contending no *Vaughn* index is required. On August 16, 1990, the Court denied defendant's motion to reconsider. One week later, the Court granted defendant's motion for an enlargement of time until September 30, 1990 to respond to the July 27 Order. That day came and passed, but defendant still had failed to file the *Vaughn* index.

Instead, on October 9, 1990, the defendant moved to modify the July 27 Order and instead submitted "a declaration from a high-ranking FBI official confirming that the documents requested by plaintiff pertain to an active and ongoing criminal investigation, and that preparation of a more detailed index would compromise and jeopardize that investigation." Defendant has blatantly ignored the Court's orders and has yet to respond to the Court's orders for the *Vaughn* index. A mere recitation by the government that documents are subject to a FOIA exemption will not suffice.

Both parties have moved for summary judgment.[1] In essence, plaintiff contends that defendant has failed to justify the withholding of the documents and defendant argues the documents are within Exemption 7(A). Without knowing the nature of the documents involved, it is impossible for the Court to evaluate the parties claims. Therefore, the defendant must come forward to the Court with evidence that the documents are entitled to exemption.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for modification of the Court's order of July 27, 1990 is **DENIED**.

---

[1] On November 16, 1990, the defendant moved for summary judgment. On October 9, 1990, plaintiff filed a memorandum in support of summary judgment, to which the defendant has responded, although plaintiff's actual motion for summary judgment was not filed until January 16, 1991.

IT IS FURTHER ORDERED that defendant produce for in camera inspection within twenty (20) days of the date of this order a *Vaughn* index in compliance with the Court's order of July 27, 1990. Failure to file such index on a timely basis could result in severe sanctions, including, but not limited to, an order to produce for in camera inspection all documents responsive to plaintiff's requests.

IT IS FURTHER ORDERED that plaintiff's motion to compel discovery is **HELD IN ABEYANCE** until the Court's receipt and consideration of the *Vaughn* index.

IT IS FURTHER ORDERED that the parties' cross motions for summary judgment are **HELD IN ABEYANCE** pending the Court's receipt and review of the *Vaughn* index.

IT IS FINALLY ORDERED that this matter is referred to United States Magistrate William S. Bahn for his~~/her~~ review of the *Vaughn* index and review and recommendation of the parties' motions for summary judgment.

Dated this 18th day of January, 1991.

/s/ Stephen N. Limbaugh
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-234C(5)

BARBARA ANN CRANCER,
Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant.

ORDER

[Filed: March 22, 1991]

This matter having come before the Court on Defendant's Motion for Relief from Order of January 18, 1991, and, following a review of the record and having conferred with counsel, the Court HEREBY ORDERS that Defendant file an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) for *in camera* inspection of the first seventeen volumes of FBI Headquarters File No. 9-60052 within ninety days of the date of this Order.

IT IS FURTHER ORDERED that the Defendant produce a *Vaughn* index for the remainder of the documents in three separate installments of seventeen volumes with each separate installment to be produced and filed ninety days after the prior installment is filed.

IT IS FURTHER ORDERED that Defendant commence preparation of the index forthwith.

Dated this 22 day of March, 1991.

/s/ William S. Bahn
United States Magistrate

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-234C(5)

BARBARA ANN CRANCER,
Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,
Defendant.

ORDER

This matter is before the undersigned on defendant's three part motion responding to the undersigned's order of March 22, 1991. Defendant requested that said order be set aside. In the alternative, defendant requested that the Court certify for appeal the question of whether the Court may order it to produce a *Vaughn* index in this matter. Finally, defendant moved for a stay of said order pending appeal.

The parties appeared before the undersigned on March 22, 1991. At that conference, the undersigned pointed out to defendant that it had been under the District Court's order to produce a *Vaughn* index of the Federal Bureau of Investigation Headquarters File No. 9-60052 since July 27, 1990. Judge Limbaugh's order of February 28, 1991, made it clear that defendant faced the prospect of sanctions it if continued to defer compliance with the three outstanding orders requiring it to produce a *Vaughn* index. The undersigned explained that his role was to facilitate defendant's compliance with these orders.

To this end he left the parties in the courtroom with instructions to draft an order for his signature incorporating a schedule

for complying with the orders to produce a *Vaughn* index. It is this order that defendant now seeks to have set aside.

IT IS HEREBY ORDERED that defendant's motion for relief from the order of March 22, 1991, is **DENIED. IT IS FURTHER ORDERED** that defendant's motion for an order for certification pursuant to 28 U.S.C. § 1292(b) is **DENIED**. Consequently, **IT IS FINALLY ORDERED** that defendant's motion for a stay of the order of March 22, 1991 pending appeal is **DENIED**.

Dated this 11 day of April, 1991.

/s/ William S. Bahn
U.S. Magistrate Judge

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-234 C (5)

BARBARA ANN CRANCER,
Plaintiff,

vs.

U.S. DEPARTMENT OF JUSTICE,
Defendant.

ORDER

IT IS HEREBY ORDERED that the United States Magistrate Judge's order of April 11, 1991 is confirmed and approved in all respects.

IT IS THEREFORE ORDERED that defendant's motion for relief from the order of March 22, 1991 is **DENIED**.

IT IS FURTHER ORDERED that defendant's motion for an order for certification pursuant to 28 U.S.C. § 1292(b) is **DENIED**.

IT IS FINALLY ORDERED that defendant's motion for a stay of the order of March 22, 1991 pending appeal is **DENIED**.

Dated this 18th day of April, 1991.

/s/ Stephen N. Limbaugh
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-0234-C-5

BARBARA ANN CRANCER,
Plaintiff,

v.

DEPARTMENT OF JUSTICE,
Defendant.

CATEGORICAL INDEX OF DOCUMENTS CONTAINED IN Federal Bureau of Investigation Headquarters File 9-60052 (James R. Hoffa Disappearance File)

The Federal Bureau of Investigation (FBI) respectfully submits for the Court's review the following index of documents located in FBI Headquarters (FBIHQ) File 9-60052, which is the file containing the results of the FBI's investigative efforts regarding the disappearance of James R. Hoffa on July 30, 1975. Contained in the 68-volume Jimmy Hoffa disappearance file, covering a time period from July 30, 1975 to the present, are the following materials:

A. Documents concerning interviews of potential witnesses, suspects, associates of Mr. Hoffa and anyone else thought to be in a position to be helpful in the investigation. Were the FBI to describe these documents by date prepared or location of the interview or by revealing the particular FBI field division which submitted the document, the FBI would inevitably be revealing to the public information sufficient to enable knowledgeable individuals, including the perpetrator(s), to ascertain what the

FBI knew at any given time about Mr. Hoffa's disappearance and, furthermore, come to valid conclusions about the identities of individuals either cooperating with the FBI or suspected by the FBI as being involved in Mr. Hoffa's disappearance. Such knowledge would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators.

B. Documents containing telephone toll records. Release of such information or, alternatively, descriptions of the documents indicating which particular FBI field division obtained the records and on what dates would reveal which individuals the FBI was interested in at a given time. Once again, knowledgeable individuals would be able to make an informed deduction as to whom the FBI was targeting at a given time and from whom the FBI was receiving information. Anyone reviewing this information would receive a clear picture of the status of the investigation and would be able to formulate a plan designed to thwart the investigation, in the manner described above.

C. Documents detailing names of individuals testifying before a federal grand jury, records subpoenaed by a federal grand jury, and transcripts of individual testimony before a grand jury. Release of this information would reveal who said what to the government about Mr. Hoffa's disappearance and related activity, and the extent of documentary evidence in the government's possession. Such knowledge would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators.

D. Documents submitted by various FBI field divisions detailing their financial expenditures in connection with, and the number and names of FBI Special Agents working on, the Jimmy Hoffa disappearance investigation over a given time period.

Release of such cost data, or description of individual documents by date and/or FBI field division, would reveal the extent of the FBI's activities in a given area at a given time, thereby giving knowledgeable individuals insight into the FBI's assessment and evaluation of the information contained in its files. Such knowledge would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators.

E. Documents containing the results of strategy conferences involving high level FBIHQ and FBI field division personnel and U.S. Department of Justice personnel, in which are set forth synopses of investigation to date, the FBI's theories regarding Mr. Hoffa's disappearance, the leads being pursued, the suspects in the case, and the suggested procedure to be followed in future efforts. These documents contain candid evaluations of suspects and confidential sources and explicit opinions as to the manner of proceeding which will afford the greatest chance for success. Release of such documents would provide a blueprint of the FBI's investigation, and would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators.

F. Documents detailing the use and/or suggested use of certain investigative techniques. These include techniques for enhancing the memories of interviewees, determining the veracity of their statements, and otherwise improving the FBI's ability to evaluate and utilize information gathered during the course of the investigation. If knowledgable [sic] individuals were to learn the methods by which the FBI has conducted its investigation, they could deduce the substance of the investigation. Such knowledge would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tam-

pering with evidence, constructing false alibis and/or otherwise misleading investigators.

G. Documents containing information furnished by local law enforcement agencies. Release of such data would reveal the location of individuals acting as informants or considered suspects during the course of this investigation. Knowledgeable individuals would be able to make an informed deduction as to whom the FBI was targeting at a given time and from whom the FBI was receiving information. Such knowledge would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators.

H. FBI laboratory reports setting forth the results of examinations of physical evidence. Disclosure of these materials would permit knowledgeable individuals to identify the physical and documentary evidence in the FBI's possession, as well as the identities of individuals interviewed and/or investigated in connection with Mr. Hoffa's disappearance. Such knowledge would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators.

I. Memoranda updating the Director of the FBI concerning the status of the FBI's investigative efforts. Release of these memoranda would reveal and undermine the internal deliberative processes of the FBI and would reveal the FBI's candid assessment and evaluation of the information contained in the file. Such knowledge would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators.

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 1991, the foregoing Brief For The Department Of Justice was served by mailing true copies by overnight mail delivery service to:

Richard E. Greenberg
Rosenblum, Goldenhersh, Silverstein & Zafft, P.C.
7733 Forsyth Bldg., 4th Floor
Clayton, MO 63105

Barbara Ann Crancer
Attorney At Law
7 Edgewood Road
St. Louis, MO 63124

Hon. Stephen N. Limbaugh
United States District Judge
United States Courthouse
1114 Market Street, Room 301
St. Louis, MO 63101

Hon. William S. Bahn
United States Magistrate
United States Courthouse
1114 Market Street
St. Louis, MO 63101

APPENDIX J

FEDERAL BUREAU OF INVESTIGATION

Date of Transcription 8/14/75

JEFFREY LYNN SCHULTZ, 5323 Fairway Lane, West Bloomfield Township, Michigan, was interviewed at his place of business, the Southfield Athletic Club, advised of the identities of the interviewing Agents and he furnished the following information:

SCHULTZ, Executive Vice President of the Southfield Athletic Club, advised that on July 30, 1975, he arrived at the club between 11:30 a.m. and 11:45 a.m. after attending a business meeting, and he made a tour of the club at 12:30 p.m. SCHULTZ stated that while on the tour he noticed TONY GIACALONE getting a message from the club masseur, DOUG RYAN. SCHULTZ advised that it was approximately 12:45 p.m. when he saw GIACALONE.

SCHULTZ stated that shortly after 2:00 p.m., GIACALONE came to SCHULTZ's office and during the course of their conversation GIACALONE mentioned he had to get over to the barbershop for an appointment he had there. SCHULTZ added that he went past the barbershop on the way to see his wife at 2:30 p.m. and he noticed GIACALONE sitting in the chair getting a haircut.

SCHULTZ recalls that he later met TONY GIACALONE in the main lobby of the Travelers Building at approximately 4:00

Interviewed on 8/5/75 at Southfield, Michigan

File # Detroit [redacted]

by SAs JAMES C. ESPOSITO and
DONALD C. BRUTNELL/cjn Date dictated 8/11/75

p.m. SCHULTZ stated that he made a comment to GIACALONE about his ears being lowered and then he returned to the club and he does not know where GIACALONE went at that time.

SCHULTZ stated that he had checked the records of the club for charges and the only charge listed for GIACALONE on July 30, 1975, was for a massage. SCHULTZ advised that there is no record of any phone calls for or from GIACALONE on July 30, 1975.

SCHULTZ advised that the next time he saw TONY GIACALONE was on Saturday, August 2, 1985, when GIACALONE arrived at the club at approximately 12:45 p.m. SCHULTZ stated that GIACALONE was alone and the main reason he [DE ■■■■■ 2] had come to the club was to meet a AL KLINE, a salesman for Dalgleish Cadillac Agency. SCHULTZ stated that he had set up the meeting between GIACALONE and KLINE as a favor to KLINE who was attempting to sell GIACALONE a 1976 Cadillac. SCHULTZ told GIACALONE he did not expect him to show up for the meeting because of all the recent stories connecting GIACALONE with the disappearance of JAMES HOFFA. GIACALONE told SCHULTZ the he was not about to hide his head in a hole because of some lousy news stories and he wanted SCHULTZ to call KLINE and set up the meeting for that afternoon.

SCHULTZ advised that GIACALONE told him that he was going to Bob's Place, a barbershop located in the lobby of the Travelers Buildings and to let him know if KLINE would be able to make the meeting. SCHULTZ called KLINE and set the meeting for 2:00 p.m. and then went to the barbershop and advised GIACALONE. SCHULTZ advised that while he was at the barbershop he noticed CHUCKIE O'BRIEN getting a haircut.

SCHULTZ added that at 2:00 p.m. KLINE and GIACALONE had a brief meeting in the Southfield Athletic Club and after

KLINE left, GIACALONE told SCHULTZ that KLINE was going to work up a price for GIACALONE and then get back to him.

SCHULTZ stated that as he was leaving the Southfield Athletic Club between 2:30 p.m. and 2:45 p.m., he noticed TONY GIACALONE and CHUCKIE O'BRIEN sitting on the couch in the main lobby of the Southfield Athletic Club. SCHULTZ was just departing in his own car when he observed GIACALONE and O'BRIEN exit the club together. SCHULTZ does not know in which vehicles GIACALONE and O'BRIEN departed.

With regards to CHUCKIE O'BRIEN, SCHULTZ advised that he has known him for a number of years and although O'BRIEN is not a dues paying member he does use the club on occasion. SCHULTZ stated that O'BRIEN came into [DE ■■■■■ 3] his office at approximately 12:00 p.m. on August 2, 1975, and O'BRIEN made a phone call to RALPH ORR (Phonetic), of the Detroit Free Press and told ORR to have his reporters stay away from the Southfield Athletic Club because the SCHULTZS were being harassed by the press for no reason at all. SCHULTZ got the impression that O'BRIEN and ORR were good friends and O'BRIEN's conversation was in no way threatening. After the phone call O'BRIEN left the club alone.

SCHULTZ further advised that he had not seen CHUCKIE O'BRIEN for approximately six months prior to his seeing him on August 2, 1975. Specifically SCHULTZ did not see O'BRIEN at the club on July 30, 1975.

SCHULTZ stated that on July 30, 1975, at approximately 1:00 p.m. - 1:15 p.m. his father LEONARD SCHULTZ, came to the club and stayed for only ten to fifteen minutes and then left to go home. JEFFREY SCHULTZ called his father at home at 2:30 p.m. and talked to him about business.

SCHULTZ furnished the following background information regarding SCHULTZ:

Name	JEFFREY LYNN SCHULTZ
Date of birth	November 14, 1950
Place of birth	Detroit, Michigan
Business Number	355-0080
Home Number	851-0899

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/5/75

LOUIS CLARK LINTEAU, also known as "The Pope", was interviewed at his place of business, Airport Service Lines, Incorporated, 200 Paddock, Pontiac, Michigan, telephone FE 2-9145, by SAs RANDOLPH G. PRILLAMAN and ROBERT J. GARRITY. LINTEAU was advised by SA GARRITY that he was being interviewed concerning a threat he had received by telephone and his knowledge of the disappearance of JAMES RIDDLE HOFFA. LINTEAU furnished the following information concerning this matter:

In the early morning of August 1, 1975, JOE ARSENAULT, who is a dispatcher at Airport Service Lines, called him at JIMMY HOFFA's residence. LINTEAU was advised by ARSENAULT that someone had called for him at Airport Service Lines and told ARSENAULT that LINTEAU was next and "he would not have long to wait". LINTEAU has not received any further communications from anyone concerning threats on his life.

Concerning the meeting which JIMMY HOFFA and TONY GIACALONE were to have on July 30, 1975, this meeting had previously been planned on two other occasions by him. GIACALONE had requested him to set up three days on each of these two occasions whereby the meeting could be arranged between JIMMY HOFFA and TONY GIACALONE. He did make arrangements with HOFFA for meetings between him and GIACALONE on two occasions.

Interviewed on 8/4/75 at Pontiac, Michigan

File # Detroit [redacted]

by SAs RANDOLPH G. PRILLAMAN and
ROBERT J. GARRITY/RGP/dmf Date dictated 8/5/75

Arrangements were made for a meeting on July 15, 16 and 17, 1975. This meeting failed to materialize and was again set up for the 22, 23 and 24 of July. GIACALONE canceled both of these meetings. He was not aware of the reason these meetings did not take place, but he did know that they did not transpire. The next time he was aware of a meeting being arranged between HOFFA and GIACALONE was on Saturday, July 26, 1975.

[DE ■■■■■]

He visited HOFFA at HOFFA's residence on the morning of July 26, 1975, and HOFFA told him the meeting is set with GIACALONE for 2:00 PM Wednesday. He was told by HOFFA that GIACALONE had been at his residence prior to his arrival.

There was no further discussion between himself and HOFFA concerning this meeting until Wednesday, July 30, 1975. He and Ms. CINDY GREEN left Airport Service Lines to go to lunch at 1:20 PM on July 30, 1975. At approximately 3:00 PM, they returned to Airport Service Lines from lunch and he was told by ELMER REEVES, who is a dispatcher at Airport Service Lines, that HOFFA had been by to see him at approximately 1:30 PM. REEVES advised him that HOFFA told him that he was going to meet TONY GIACALONE at the Red Fox at 2:00 PM.

At approximately 3:30 PM, July 30, 1985, he received a telephone call from JIMMY HOFFA whereby HOFFA told him "Son of a bitch GIACALONE is an hour and a half late for the meeting". HOFFA indicated to him that he was leaving the Red Fox immediately and would stop by Airport Service Lines to see him on his way home.

HOFFA did not arrive at Airport Service Lines by 5:30 PM on July 30, 1975, and he left Airport Service Lines at that time with JOE BANE for an appointment he and BANE had with JOE LOCHRICCHIO and an individual by the name of NEEDELANDER (phonetic): This meeting was concerning the

transportation of various musical groups to and from Pine Knob. This meeting terminated at approximately 7:15 PM and he was at his residence, 615 East Tennyson, Pontiac, Michigan, from approximately 8:00 PM to 10:00 PM.

At 10:00 PM, he arrived back at Airport Service Lines and saw that he had not received any calls from HOFFA and so he called HOFFA's residence, telephone number 693-1748. JOSEPHINE HOFFA answered the telephone and he asked to speak to JIMMY. He was asked by Mrs. HOFFA "where is my husband" and he was further advised by Mrs. HOFFA that HOFFA had never come home and the last time she heard from him was at approximately 2:15 PM. Mrs. HOFFA advised that HOFFA asked [DE ■■■■■■] her if TONY GIACALONE had called. He was told by Mrs. HOFFA that she had not received any calls from TONY GIACALONE and she had told her husband this and that she had a couple of steaks out for dinner.

At approximately 10:10 PM, he called the Red Fox Restaurant and asked them to page Mr. JAMES RIDDLE HOFFA and he was told that Mr. HOFFA does not answer his page.

At approximately 10:25 PM, he placed a telephone call to telephone number 774-2143, which is the residence of TONY GIACALONE's son and is the telephone number he has been given to get in contact with TONY GIACALONE. He talked with TONY GIACALONE and asked him where was JIMMY and that he had not come home from his appointment which was with GIACALONE at the Red Fox. GIACALONE advised him that he did not know anything about a meeting and he had been at the Southfield Athletic Club all day. He felt that GIACALONE was fully aware of the meeting, but he saw that he was not getting any place by talking with GIACALONE and so he hung up the telephone.

At approximately 10:30 PM, he called JOE BANE and told him that JIMMY was missing and he had been unable to contact

him at the Red Fox. He was advised by BANE that there were two dining rooms at the Red Fox and he should call back. At 10:45 PM, he called the Red Fox again and determined that no one had waited on Mr. HOFFA at the restaurant nor had nay of his credit cards been used.

After this conversation with GIACALONE, he called CINDY GREEN and they made arrangements to go to JIMMY HOFFA's residence to stay with Mrs. HOFFA. He and Ms. GREEN arrived at the HOFFA residence between 11:30 and 12:00 PM.

He, Ms. GREEN and Mrs. HOFFA discussed whether they should contact JIMMY PHILIP HOFFA that night to advise him of the situation. The decision was made to wait until morning before contacting JIMMY PHILIP HOFFA. In the early morning of July 31, 1975, JIMMY PHILIP HOFFA was contacted regarding this matter.

[DE ■■■■■■]

While he was at the HOFFA residence, Mrs. HOFFA was very upset, she felt something happened to her husband because he would always call if he was going to be late coming home. Mrs. HOFFA again told him that JIMMY HOFFA had called at approximately 2:15 wanting to know if he had received any calls from TONY GIACALONE. He, Ms. GREEN and Mrs. HOFFA stayed up until approximately 3:00 AM on July 31, 1975, before he laid down for a nap.

He awoke at approximately 5:30 AM and observed Mrs. HOFFA taking coffee to news people who were located on the street next to the HOFFA residence. After giving coffee to the news reporters, Mrs. HOFFA returned to the residence and told him "you have to find JIMMY".

He left the residence of JIMMY HOFFA at approximately 6:15 AM and arrived at Airport Service Lines at 6:45 AM. Upon arrival at his office, he called TONY GIACALONE at telephone

number 774-2143. GIACALONE answered and told him he was making coffee. He then advised GIACALONE that the "little guy" meaning HOFFA, did not come home last night. He then asked GIACALONE "where the hell is he", meaning HOFFA. He was advised by GIACALONE "maybe he took a trip". He reiterated the fact with GIACALONE that he had set up the meeting but GIACALONE would only state that he was at the Southfield Athletic Club. LINTEAU was also told by GIACALONE that "the guy is in the hospital". LINTEAU did not know what GIACALONE meant by this statement.

Later that morning he discussed the fact that JIMMY HOFFA was missing with his employees and from his conversation with his employees at Airport Service Lines, he felt that HOFFA was not himself when he came to Airport Service Lines on July 30, 1975. HOFFA appeared to be very nervous to his employees and was acting very strangely.

At approximately 7:30 AM, he went to the Red Fox Restaurant and observed a vehicle which looked very similar to HOFFA's vehicle, which is a 1974 Pontiac Grand Ville, parked in the parking lot of the Red Fox. He observed the passenger door unlocked and observed a small umbrella along with some other gadgets which are used to insert into the seat belt fastener to prevent the buzzers from sounding. He knew these items as ones belonging to HOFFA. He then opened the glove compartment of the vehicle and observed the registration for the vehicle which showed that it was registered to JAMES RIDDLE HOFFA.

[DE [redacted]]

At approximately 8:00 AM, he returned to Airport Service Lines and called Ms. GREEN, who was at the HOFFA residence, and advised her that they had found the car at the Red Fox and arrangements were being made to have the trunk opened. During this conversation, GREEN advised him that young JIMMY was flying to Pontiac, Michigan. He made arrangements to have JAMES PHILIP HOFFA picked up at the airport.

Since this time, he has spent his time either at Airport Service Lines or at the residence of JIMMY HOFFA. During the time he has been at the HOFFA residence, he has been told by young HOFFA that a neighbor observed TONY GIACALONE and BILLY GIACALONE at the HOFFA residence on Saturday, July 29, 1975. The neighbor's name is [redacted]. According to young JIMMY, [redacted] observed the GIACALONEs at the residence and felt that something was wrong. He did not have knowledge that this meeting with TONY GIACALONE concerned TONY PROVENZANO. He is aware that there is some hard feelings between HOFFA and PROVENZANO but he was not aware of any meetings having been arranged between HOFFA and PROVENZANO.

On August 1, 1975, JIMMY PHILIP HOFFA wanted to meet TONY GIACALONE in regards to his father's disappearance. JIMMY P. HOFFA did call TONY GIACALONE in efforts to have a meeting but GIACALONE refused to meet with him.

He is a very close personal and business associate of JAMES R. HOFFA. He has been used by HOFFA and other individuals as a go between for various meetings and business transactions between HOFFA and other individuals.

In regards to this, he became acquainted with TONY GIACALONE through CHUCK O'BRIEN who is the adopted son of JIMMY HOFFA. He was approached by O'BRIEN in connection with a condominium located in Bay Harbor, Florida, that TONY GIACALONE wanted to sell. O'BRIEN introduced him and GIACALONE and he agreed to purchase this condominium from GIACALONE for $135,000.00, due to the fact it was close to HOFFA's residence. Purchase arrangements for the condominium was [sic] as follows:

[DE [redacted]]

$10,000.00 down, 20 pre-dated monthly checks each for $2,500.00 and the remaining $60,000.00 through a mortgage.

This condominium was purchased by him approximately a year and a half ago but as of this date, he has not established residence or has anyone resided in this condominium.

He has had contact with GIACALONE on occasions since the purchase of this condominium and he has set up arrangements whereby GIACALONE has made a substantial amount of money.

CHUCK O'BRIEN had been in serious financial troubles over the past years and JIMMY HOFFA has utilized him to assist O'BRIEN in these financial problems. O'BRIEN had accumulated numerous debts and had caused HOFFA to spend a lot of money to take care of these problems. O'BRIEN's financial problems were well-known to numerous individuals, in fact in a conversation he had with TONY GIACALONE, GIACALONE made mention of the fact that O'BRIEN was into them for a lot of money which they did not know if he would be able to repay.

He feels that JIMMY HOFFA thinks of O'BRIEN as being a son and has been very close to him over the years, up until the last six months. Some serious problem had developed between HOFFA and O'BRIEN at this time and HOFFA has become very upset with O'BRIEN.

The only knowledge he has about O'BRIEN is in assisting HOFFA with O'BRIEN's financial problems and attempting to get O'BRIEN to accept responsibility. During this time was when JIMMY HOFFA and himself became very close friends and associates. Prior to this time, he and HOFFA had not been on a friendly basis. Due to the fact that he was able to assist O'BRIEN on numerous problems, he became a trusted friend and companion of JIMMY HOFFA. He feels that O'BRIEN could be used by enemies of HOFFAs to set him up because everyone knew that HOFFA was very close to O'BRIEN and would do anything to protect him or any member of his family.

He feels after talking with individuals who observed HOFFA on Wednesday, July 30, 1975, that HOFFA was aware of

something being very wrong and as a result of this, HOFFA acted completely out of character. He feels that the reason for the meeting that HOFFA was to have that day would also contain the motive of his abduction or death.

LINTEAU was asked by SA GARRITY if he would consent to a polygraph examination, at which time LINTEAU stated that he would and executed a Consent to Interview by Polygraph form.

The following description was obtained from observation and interview:

Name	LOUIS CLARK LINTEAU
Alias	"The Pope"
Address	615 East Tennyson Pontiac, Michigan
Telephone	335-1153
Race	White
Sex	Male
Height	5'7"
Weight	160
Hair	Gray
Marital status	Married
Wife	MARCELINE
Children	SHARON K. LINTEAU BELL (adopted)
Employment	Airport Service Lines 200 Paddock Pontiac, Michigan 332-9146
Social Security Number	383-18-4061
Driver's license	L 530-549-119-280
Previous arrests	1955 charged 4-1/2 months for Gratuity

Supreme Court, U.S.
FILED
FEB 4 1994
OFFICE OF THE CLERK

No. 93-700

In the Supreme Court of the United States

OCTOBER TERM, 1993

BARBARA ANN CRANCER, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

18 pp

QUESTION PRESENTED

Whether the government properly declined to create a document-by-document "*Vaughn* index" of law enforcement records withheld under Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(A).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Barney v. *INS*, 618 F.2d 1268 (8th Cir. 1980)	10
Bevis v. *Department of State*, 801 F.2d 1386 (D.C. Cir. 1986)	7, 12
Church of Scientology v. *IRS*, 792 F.2d 146 (D.C. Cir. 1986)	7, 11
Curran v. *Department of Justice*, 813 F.2d 473 (1st Cir. 1987)	10
Dickerson v. *United States Department of Justice*, 992 F.2d 1426 (6th Cir. 1993), petition for cert. pending, No. 93-678 (filed Oct. 29, 1993)	9
Founding Church of Scientology, Inc. v. *Bell*, 603 F.2d 945 (D.C. Cir. 1979)	5
Keys v. *United States Department of Justice*, 830 F.2d 337 (D.C. Cir. 1987)	5
King v. *United States Department of Justice*, 830 F.2d 210 (D.C. Cir. 1987)	11
Lewis v. *IRS*, 823 F.2d 375 (9th Cir. 1987)	10
Moorefield v. *United States Secret Service*, 611 F.2d 1021 (5th Cir.), cert. denied, 449 U.S. 909 (1980)	10
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)	6, 8, 9
North v. *Walsh*, 881 F.2d 1088 (D.C. Cir. 1989)	10
Spannaus v. *United States Department of Justice*, 813 F.2d 1285 (4th Cir. 1987)	10

Cases—Continued: Page

United States Department of Justice v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) 10
Wiener v. *FBI*, 943 F.2d 972 (9th Cir. 1991), cert. denied, 112 S. Ct. 3013 (1992) 11
Wright v. *OSHA*, 822 F.2d 642 (7th Cir. 1987) 10

Statutes:

Freedom of Information Act, 5 U.S.C. 552 2
5 U.S.C. 552(a)(4)(B) 3
5 U.S.C. 552(b)(7)(A) (1982) 10
5 U.S.C. 552(b)(7)(A) 2, 3, 6, 7, 8, 9, 10, 11, 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-700

BARBARA ANN CRANCER, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A33) is reported at 999 F.2d 1302. The panel opinion of the court of appeals (Pet. App. A34-A49) is reported at 950 F.2d 530. The opinions of the district court (Pet. App. A50-A60) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1993. The petition for a writ of certiorari was filed on November 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1975, James Riddle Hoffa, the former president of the International Brotherhood of Teamsters, disappeared in Michigan. The Federal Bureau of Investigation (FBI) immediately launched an intensive nationwide investigation into his disappearance. Pet. App. A35. Although no suspects have been charged, the investigation has never been closed, and the FBI continues to pursue the investigation actively. C.A. App. 69. Materials relating to the Hoffa investigation are contained in an open investigatory file in FBI headquarters (FBIHQ) in Washington, D.C. The 69 volumes of the FBIHQ file contain approximately 13,800 pages of records. *Id.* at 147.[1]

In 1987, the Department of Justice received a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, from petitioner, Hoffa's daughter, relating to the records at FBIHQ. C.A. App. 24-25. Although her request initially sought only information relating to a potential witness (*ibid.*), petitioner broadened the request to cover "any and all documents" in the FBIHQ Hoffa file. *Id.* at 77.

The FBI denied petitioner's requests, invoking Exemption 7(A) of the FOIA, 5 U.S.C. 553(b)(7)(A). C.A. App. 28, 78, 80. Exemption 7(A) exempts all "records or information compiled for law enforcement purposes * * * to the extent that the production * * * could reasonably be expected to interfere with enforcement proceedings."

---

[1] Additional records relating to Hoffa's disappearance are maintained by the FBI's Detroit Field Office. Those records are not the subject of petitioner's request.

2. In February 1989, Crancer filed this action against respondent in the United States District Court for the Eastern District of Missouri under 5 U.S.C. 552(a)(4)(B). Petitioner's amended complaint alleged that the contents of the FBIHQ Hoffa file are not exempt from disclosure under Exemption 7(A). See C.A. App. 46-49.

In June 1990, respondent moved for summary judgment based on Exemption 7(A). In support of its motion, respondent submitted declarations by Special Agent Angus B. Llewellyn, a supervisor in the Freedom of Information-Privacy Acts Section at FBIHQ, and from Special Agent Jim E. Moody, the Chief of the Organized Crime Section of the Criminal Investigative Division at FBIHQ. C.A. App. 60-63, 64-76. The Moody declaration explained that the Hoffa investigation is ongoing and that

> [t]he files responsive to [petitioner's] FOIA request contain documents detailing the FBI's theories regarding the case, investigate leads [the FBI is] pursuing (and those [the FBI does not] consider worthy of pursuit), information furnished by confidential sources, information indicating who[] the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation. * * * In addition, the documents located in the voluminous file regarding this investigation contain information which may be utilized in a myriad of other possible criminal proceedings at the Federal, state and local levels.

Id. at 61. The Llewellyn declaration enumerated the categories of documents covered by the request,[2] and explained that the information contained in those records could enable the persons responsible for Hoffa's disappearance to "destroy or tamper with evidence, intimidate witnesses or construct a false alibi." *Id.* at 70-71.

The district court declined to rule on respondent's motion for summary judgment. Instead, the district court ordered respondent to serve upon petitioner within 30 days "an itemized, indexed inventory of every agency record or portion thereof responsive to [petitioner's] FOIA request which [respondent] asserts to be exempt from disclosure, accompanied by a detailed justification statement covering each refusal to release said agency records or portions thereof in accordance with the indexing requirements outlined in *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir.

---

[2] Special Agent Llewellyn indicated that the files contain the following eight categories of records (C.A. App. 69-70):

[1] Documents setting forth leads to be conducted.

[2] Documents containing information received from confidential informants.

[3] Information and documents provided by local law enforcement.

[4] Interviews of third parties and cooperating witnesses.

[5] Public source information such as newspaper clippings and press releases.

[6] Public and sealed court documents.

[7] Laboratory reports setting forth the results of examination.

[8] Polygraph worksheets and reports.

1973), *cert. denied*, 415 U.S. 977 (1974)." Pet. App. A50.[3]

Respondent requested the district court to modify its order, and presented to the court a "categorical" index that broke down the contents of the FBIHQ Hoffa file into nine specific categories: (1) records of interviews of potential witnesses, suspects, associates of Hoffa, and others who may be of potential assistance to the investigation; (2) records containing the FBI's telephone toll records; (3) grand jury materials, including names of those who have given testimony, subpoenaed records, and transcripts of testimony; (4) records from FBI field divisions setting forth financial expenditures relating to the investigation; (5) records of high-level strategy conferences; (6) records describing the use of investigative techniques; (7) information furnished by local law enforcement agencies in connection with the investigation; (8) laboratory reports; and (9) memoranda to the Director of the FBI regarding the status of the investigation. Pet. App. A61-A64. With respect to each category of documents, the index described in

---

[3] A so-called "*Vaughn* index" is an itemized inventory that "describe[s] each withheld document or deletion from a released document," "state[s] the exemption claimed for each deletion or withheld document," and "explain[s] why the exemption is relevant" to the document. *Founding Church of Scientology, Inc.* v. *Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979) (summarizing requirements). It is designed to assist the district court in reviewing the agency's withholding decisions on a document-by-document basis and to permit the requester to respond to the agency's claims of exemption. See *Keys* v. *United States Department of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987).

detail the potential harm to law enforcement efforts that would be caused by disclosure. *Ibid.*[4]

In January 1991, the district court denied the request to modify its order, and directed the government to submit a *Vaughn* index for in camera review. Pet. App. A36; see also *id.* at A52-A60.

3. Respondent then petitioned the court of appeals for a writ of mandamus. In December 1991, a divided panel of the court of appeals held that the district court had authority to order a document-by-document *Vaughn* index. Pet. App. A34-A49. The court acknowledged that in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Court held that the government may invoke Exemption 7(A) by establishing that generic categories of documents could reasonably be expected to interfere with law enforcement proceedings. Pet. App. A40; see *id.* at A41 (under *Robbins Tire*, "the district court cannot require the government to justify its decision to deny disclosure on a document-by-document basis"). The court, however, found that a document-by-document *Vaughn* index was nevertheless an appropriate way for the district court to "verify that the government has fulfilled its obligation to examine each document individually." *Id.* at A41-A42.[5]

---

[4] For example, the index explained that disclosure of the strategy memoranda "would provide a blueprint of the FBI's investigation" and "would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators." Pet. App. A63.

[5] Judge Wollman dissented, expressing the view that the majority's decision was inconsistent with the generic approach

4. The court of appeals granted rehearing en banc and reversed. Pet. App. A1-A33. The majority held that the district court's insistence on a document-by-document justification for withholding records under Exemption 7(A) "goes beyond the categorical explanations that * * * *Robbins Tire* held to be sufficient to justify nondisclosure under Exemption 7(A)." Pet. App. A13. The court explained that "[w]hen . . . a claimed FOIA exemption consists of a generic exclusion [such as Exemption 7(A)], dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile." *Id.* at A13 (quoting *Church of Scientology* v. *IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986)). Under *Robbins Tire*, the court explained, "the government may meet its burden by showing how disclosure of each category of documents would likely interfere with the investigation." Pet. App. A12 n.3.

The en banc court made clear, however, that "[w]hile the district court may not order a *Vaughn* index * * *, it still must satisfy itself that the requested documents have been properly withheld." Pet. App. A15-A16. Relying on *Bevis* v. *Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986), the court held that "[1] the government must define functional categories of documents; [2] it must conduct a document-by-document review to assign documents to proper categories; and [3] it must explain to the court how the release of each category would interfere with enforcement proceedings." Pet. App. A14. If the categories offered by the government are not

---

to Exemption 7(A) required by *Robbins Tire*. Pet. App. A45-A49.

sufficiently functional, the court of appeals explained, the district court may require "more specific, distinct categories" and may conduct in camera review of the disputed records. *Id.* at A14-A15.

The court of appeals "express[ed] no opinion" on the question whether the evidence submitted by respondent "satisfies the *Bevis* paradigm." Pet. App. A14 n.4. It remanded the case to the district court for resolution of that question and the ultimate issue of whether the FBIHQ Hoffa file is protected by Exemption 7(A). *Id.* at A16.[6]

ARGUMENT

The court of appeals correctly held that the district court could not properly require respondent to prepare a document-by-document *Vaughn* index for the nearly 14,000 pages of law enforcement records it withheld under Exemption 7(A) of the Freedom of Information Act. That ruling is consistent with this Court's decision in *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*, and with the decisions of other courts of appeals. The court of appeals in this case, moreover, did not address whether the contents of the Hoffa file are exempt from disclosure under Exemption 7(A) or whether respondent's categorical showing in this case was sufficient under the FOIA. Those questions will be resolved in the ongoing district court proceed-

---

[6] Judge McMillian, joined by Chief Judge Arnold, dissented, Pet. App. A16-A33, concluding that the district court had authority under the FOIA to order the production of a *Vaughn* index in an Exemption 7(A) case. *Id.* at A19-A33.

ings and may eliminate any need for this Court's review.[7]

1. Exemption 7(A) of the FOIA authorizes agencies to withhold "records or information compiled for law enforcement purposes * * * to the extent that the production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). This Court has recognized that unlike certain other FOIA exemptions, which "seem to require a showing that the factors made relevant by the statute are present in each distinct situation," the language of Exemption 7(A) "appears to contemplate that certain generic determinations might be made." *Robbins Tire*, 437 U.S. at 223-224. In light of the purposes underlying that exemption, moreover, this Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally

---

[7] The Sixth Circuit recently sustained the FBI's withholding of records from the Hoffa file under Exemption 7(A), holding that the categorical index the FBI submitted was adequate and that the district court had correctly found that the records sought could reasonably be expected to interfere with a future prosecution. *Dickerson* v. *United States Department of Justice*, 992 F.2d 1426 (1993), petition for cert. pending No. 93-678 (filed Oct. 29, 1993). The en banc court below noted that the Sixth Circuit's ruling in *Dickerson*, while not binding here, "does give credence to the Department's assertion of the 7(A) exemption in this case." Pet. App. A16. We have furnished counsel for petitioner with a copy of our brief in opposition in *Dickerson*.

'interfere with enforcement proceedings.'" *Id.* at 236.[8]

Accordingly, the courts of appeals have consistently applied a categorical approach in cases arising under Exemption 7(A). "It is well-established that 'the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document.'" *North* v. *Walsh*, 881 F.2d 1088, 1097 n.13 (D.C. Cir. 1989). Under that approach, a document-by-document *Vaughn* index is not required. See, *e.g.*, *Lewis* v. *IRS*, 823 F.2d 375, 380 (9th Cir. 1987); *Wright* v. *OSHA*, 822 F.2d 642, 645-646 (7th Cir. 1987); *Spannaus* v. *United States Department of Justice*, 813 F.2d 1285, 1288 (4th Cir. 1987); *Curran* v. *Department of Justice*, 813 F.2d 473, 475 (1st Cir. 1987); *Moorefield* v. *United States Secret Service*, 611 F.2d 1021, 1023-1024 (5th Cir.), cert. denied, 449 U.S. 909 (1980); *Barney* v. *IRS*, 618 F.2d 1268, 1272-1274 (8th Cir. 1980). Indeed, as the D.C. Circuit (the court that devised the *Vaughn*

---

[8] When this Court decided *Robbins Tire*, Exemption 7(A) shielded law enforcement records whose disclosure "*would* * * * interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (1982) (emphasis added). In 1986, Congress amended Exemption 7(A) to require the government to show only that disclosure "*could reasonably be expected to* interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (1988) (emphasis added). That change "represents a considered congressional effort 'to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7].'" *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989). The withholding at issue in this case is therefore governed by a more generous standard than the one in place when the decision in *Robbins Tire* was issued.

index) has explained, "[w]hen * * * a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile." *Church of Scientology* v. *IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986).

The decision of the court of appeals in this case is consistent with that uniform body of precedent. We are unaware of any post-*Robbins Tire* decision of a court of appeals holding that a district court may appropriately order a document-by-document *Vaughn* index when the government justifies withholding exclusively on the basis of Exemption 7(A).[9]

2. Petitioner concedes (Pet. 10) that "categorical showings under *Robbins Tire* are permissible to demonstrate the likelihood of harm" in Exemption 7(A) cases, but insists that a document-by-document *Vaughn* index is still needed to resolve other issues under Exemption 7(A). Specifically, she argues (Pet. 7-8) that a *Vaughn* index is needed to determine that the government has reviewed all of the documents, that they all fit within the categories identified, that they have not been publicly released, and that there are no reasonably segregable, nonexempt portions of the records.

As discussed above, since *Robbins Tire*, the courts of appeals have consistently declined to require

---

[9] Petitioner quotes (Pet. 8-9) court of appeals decisions that discuss the usefulness of *Vaughn* indexes in adjudicating FOIA cases. Those cases, however, do not involve Exemption 7(A). See *King* v. *United States Department of Justice*, 830 F.2d 210 (D.C. Cir. 1987) (Exemption 1, 7(C), 7(D)); *Wiener* v. *FBI*, 943 F.2d 972, 977 n.2 (9th Cir. 1991) (Exemptions 1, 2, 3, 7(C), 7(D)), cert. denied, 112 S. Ct. 3013 (1992).

Vaughn indexes. Moreover, it is premature to consider what kind of showing is necessary to sustain a claim of exemption under Exemption 7(A) in this case. Neither the court of appeals nor the district court has decided whether respondent's categorical declarations are sufficient to resolve the outstanding factual and legal questions in this case. The court of appeals cited (Pet. App. A14) *Bevis* v. *United States Department of State*, *supra*—a case on which petitioner heavily relies (Pet. 10-11)—for the appropriate standard to apply to petitioner's challenge on remand. While not calling for a *Vaughn* index, *Bevis* establishes the following framework under Exemption 7(A):

> First, [the government] must define its categories functionally. Second, it must conduct a document-by-document review in order to assign documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings.

801 F.2d at 1389-1390.

Because the "proceeding below * * * focused only on whether the district court could order a *Vaughn* index," the court of appeals in this case "express[ed] no opinion as to whether the categorical index submitted by [respondent] * * * satisfies the *Bevis* paradigm." Pet. App. A14 n.4. Accordingly, the sufficiency of the government's submissions will be reviewed in the proceedings now pending on remand, and further review of petitioner's claims is premature.[10]

---

[10] Petitioner asserts (Pet. 10) that the decision of the court of appeals "guarantee[s] the withholding of any documents

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
SCOTT R. MCINTOSH
Attorneys

FEBRUARY 1994

---

ments claimed to be exempt under Exemption 7(A)." That contention is baseless; the court of appeals did not hold that any of the withheld documents are protected by Exemption 7(A). Nothing in the court of appeals' decision forecloses the district court from engaging in careful review of the government's withholding claim under the standards set forth in *Robbins Tire* and *Bevis*.